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When Academic Freedom Collides with Religious Liberty of Religious Universities

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ARTICLE

WHEN ACADEMIC FREEDOM COLLIDES WITH RELIGIOUS LIBERTY OF RELIGIOUS UNIVERSITIES

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I. INTRODUCTION

One in five U.S. colleges and universities has ties to a religious organization.¹ Religiously affiliated institutions of higher education are diverse, varying in mission, character, religious affiliation, and the role that research and scholarship play in the preparation of students to lead impactful lives.² The most explicitly religious of these institutions, theological seminaries, train students for careers within the faith, as ministers, priests, and imams. Other institutions are outwardly indistinguishable from their secular counterparts, even if loosely affiliated with religious orders at their founding or today. Yet others strive to admit students with largely the same faith commitments, who are educated not only in the faith but in all manner of disci-

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1. See Daniel Frost, *Sexually Conservative Religious Universities and Tax Exemption*, 59 J. CHURCH & STATE 566, 596 (2017), <http://jcs.oxfordjournals.org/content/early/2016/07/07/jcs.csw049.full.pdf+html?sid=e83aeebd-dc9d-4b74-aaa0-9a971377c25f> (estimating that there are 1,014 religious universities in the United States); Jeffrey J. Selingo, *How Many Colleges and Universities Do We Really Need?*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/?utm_term=.0ec007116070 (estimating that there are 5,300 colleges and universities in the United States).

2. See Shirley V. Hoogstra, Shapri D. LoMaglio & Brad Crofford, *Finding a Way Forward at Covenantal Universities*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018).

plines.³ These “covenantal universities” are engaged principally in preparing students to act “as Christ’s agents of renewal in the world,” in whatever career they choose.⁴ To borrow an image from Professor Stephen Carter, “covenantal universities” operate at the margin between the sectarian and the secular, straddling the wall of separation between church and state.⁵

That endeavor of preparing students to live out their faith in every dimension of their lives—including their careers—places a premium on having faculty (as well as staff) who share the institution’s religious and theological views. A recognition that religious organizations generally, and religious institutions of higher education specially, need the flexibility to hire and retain employees who share the institution’s faith commitments, and to conduct their operations consistent with their faith tenets, has been stamped into federal law and the law of some states. Title VII of the Civil Rights Act of 1964⁶ and Title IX of the Education Amendments of 1972⁷ are two examples.

But what happens when an already-hired faculty member takes a vocal position—in the classroom or outside it—that departs from the theological commitments or social understandings of a covenantal university? What happens when an institutional viewpoint is being critiqued from within? Many look not to the legal regulation of religious universities to resolve these competing rights, but view the clash through the lens of academic freedom. Consider, for example, the 2016 dust-up at Wheaton College, the self-described “explicitly Christian”⁸ college, which “parted ways” with political science faculty member Larycia Hawkins. Hawkins had said publicly a statement that rings as tolerant and inclusive to many—“I stand in religious solidarity with Muslims because they . . . are people of the book”⁹—and wore a headscarf as a symbol of solidarity. But to Wheaton and some alumni, Hawkins’s statement struck a very different chord: it conflated the gods of Christianity and Islam, hitting a nerve in an ongoing debate in Christian circles about whether all faiths are equal paths to God.¹⁰ The pre-

3. Michael W. Lee, *What Is a Christian School?*, PERSPECTIVE (Jan. 11, 2006), at 1, <https://www.cherokeechristian.org/wp-content/uploads/2013/10/BadMyth-whatisachristianschool.pdf> (positing that such schools “agree with parents to provide a consistent, Christ-centered education” firmly rooted in Scripture and “strive to enroll only Christian families”).

4. *About*, CALVIN COLLEGE, <https://calvin.edu/about/> (last visited Oct. 20, 2018).

5. Stephen L. Carter, *The Constitutional and the Religious University*, 47 DEPAUL L. REV. 479, 483 (1998).

6. 42 U.S.C. § 2000e et seq.

7. 20 U.S.C. § 1681 et seq.

8. *About Wheaton College*, WHEATON COLLEGE, <https://www.wheaton.edu/about-wheaton/> (last visited Oct. 20, 2018).

9. Ruth Graham, *The Professor Suspended for Saying Muslims and Christians Worship One God*, THE ATLANTIC (Dec. 17, 2015), <http://www.theatlantic.com/politics/archive/2015/12/christian-college-suspendprofessor/421029/>.

10. *Id.*

eminent organization for academic freedom promotion in America, the American Association of University Professors (“AAUP”), which maintains strong ties with accrediting organizations,¹¹ observed of Hawkins’s firing: “The AAUP would prefer that institutions in general don’t place these kinds of restrictions on academic freedom, but we have historically recognized the right of religious institutions to do so.”¹² A commenter on AAUP’s site asked whether Wheaton’s faculty are “aware, before they begin to work there, that Wheaton is an institution that restricts academic freedom?”¹³

This essay does not attempt to resolve this clash. Instead, it charts the crosscurrents and tensions between legal protections for the religious freedom of religious universities and notions of academic freedom. In brief, the legal protections for religious freedom of religious universities and organizations move in one direction—favoring Wheaton’s ability to push a specific theological view through its operations, including the firing and disciplining of dissenters. Some may reflexively see that prerogative as a free pass to religious employers to discriminate; yet, just as organizations like the Sierra Club need not hire a climate change denier,¹⁴ religious employers are not required to hire or retain persons who are fundamentally at odds with their deepest faith commitments. Moving in the other direction are notions of academic freedom of individual faculty, which favor the ability of faculty, like Hawkins, to stake out and announce positions, without repercussion, that *may be* at odds with the university that employs them and its stated mission. This essay contends the AAUP’s historical emphasis on notice to faculty overlooks a key constituency with as much at stake: students themselves. We argue that under conditions of notice to students and faculty at covenantal universities which self-define as openly operating to prepare students to be God’s emissaries in the world, the concerns underpinning academic freedom—space for faculty to do rigorous academic work—do not map well onto disputes that are theological.¹⁵ In theological disputes, the covenantal university’s view must prevail in order to accomplish its *raison d’etre*.

11. See *infra*, Part IV.

12. LauraM, *Who Wants to Teach at Wheaton College?*, AAUP (Jan 21, 2016), <https://www.aaup.org/content/who-wants-teach-wheaton-college>.

13. *Id.*

14. James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 462 (2015) (“Freedom-of-association law is asymmetrical. Various expressive associations—advocacy groups, political parties, cultural societies, and religious organizations—are eligible to claim some degree of institutional autonomy with respect to membership and internal governance. Commercial associations, however, are only entitled to minimal constitutional protection from state regulation. So, while the Boy Scouts can invoke the power of the First Amendment to resist antidiscrimination laws, no such protection is available to Wal-Mart. Not everyone is pleased with this associational asymmetry. Indeed, for years critics have forcefully challenged the distinction between expressive associations and commercial associations.”).

15. Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 J.L. & INEQUALITY 385, 391 (2016).

This essay explores a standard borrowed from Title VII itself and asks whether it can meld meaningful religious liberty with meaningful academic freedom. Part I highlights the distinctive characteristics of covenantal universities. Part II canvasses types of academic freedom conflicts inside and outside university environments and notes that the university has academic freedom interests in addition to those of faculty. Part III sketches the thick legal protection of institutional religious liberty of religious universities under Title VII and Title IX, and argues that the legal norms under the former, which permits religious employers to “religiously discriminate,” provide a coherent line for when we should respect the institutional religious freedom of covenantal universities or when we should instead tilt in favor of the faculty member’s individual academic freedom. Part IV explores how the AAUP has fluctuated in its stance towards religiously affiliated colleges and universities, emphasizing both rigor of inquiry and “flying under false colors.” Part V then recognizes that difficult cases fall on different sides of the line borrowed from Title VII for melding institutional religious liberty and academic freedom. Part VI discusses the mechanics of notice at religious institutions and how it responds to the concerns underpinning academic freedom. Ultimately, this essay concludes that an overly thick notion of academic freedom for faculty at covenantal colleges and universities threatens to wash out the religious character of those institutions. Borrowing a page from the treatment of religious employers and universities under federal employment law respects two important values: institutional religious liberty and individual academic freedom.

II. THE RICH TAPESTRY OF RELIGIOUS UNIVERSITIES

Of the 5,300 colleges and universities sprawled across the United States,¹⁶ 1,014 of them, roughly one-fifth, have ties to a religious organization.¹⁷ Given that many of America’s oldest colleges and universities were founded by religious orders,¹⁸ this makes sense. These institutions of higher education are diverse. They vary in mission, character, scholarly engagement, and religious affiliation.

While scholars have offered other taxonomies of religiously affiliated universities,¹⁹ it is useful to array organizations along a spectrum from the most obviously sectarian—seminaries, whose mission is to train students to

16. Selingo, *supra* note 1.

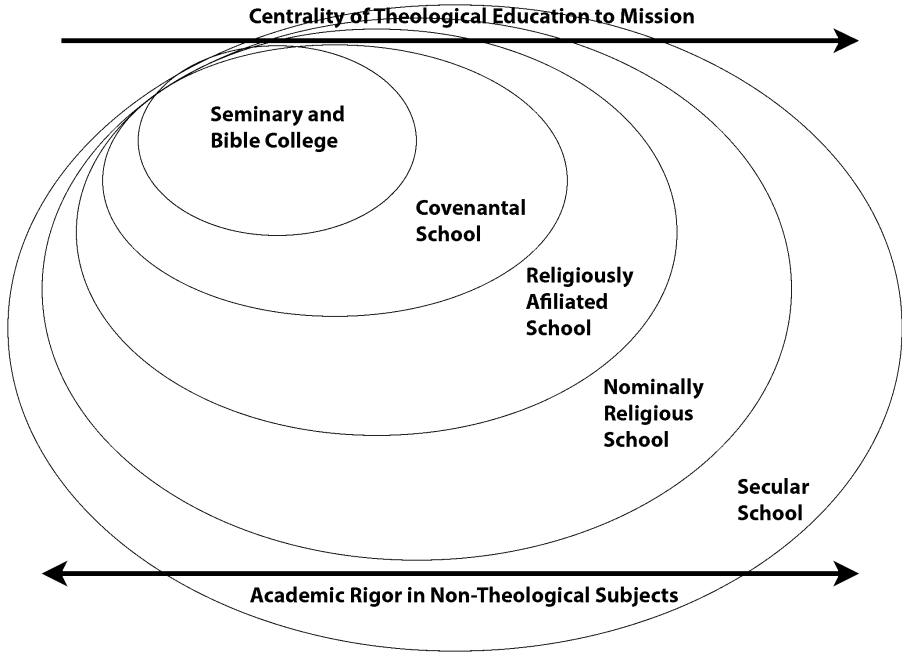
17. Frost, *supra* note 1.

18. Paulo Turchioe, *The Best Religiously Affiliated Colleges*, FORBES (May 21, 2010), <https://www.forbes.com/2010/05/21/religiously-affiliated-colleges-leadership-education-best.html#a4d0f006aee6>.

19. For example, another “taxonomy” of the “universe of church-affiliated institutions” divides religious educational institutions into three categories: (1) “non-affirming college[s],” which give little formal attention to religion; (2) “free Christian (or Jewish) college[s],” which stand for both religious and liberal education; and (3) “defender[s] of the faith,” whose purpose is to educate people who will become leaders in a particular religious tradition. Matthew W. Finkin et al.,

propagate the faith—to schools that are “religious in name only” and are virtually indistinguishable from secular institutions,²⁰ as Figure 1 does.

FIGURE 1 DEGREE OF RELIGIOSITY AT RELIGIOUSLY AFFILIATED SCHOOLS



Of course, categorizing institutions along a spectrum of religiosity is not an exact science. Moreover, schools along the continuum may be more or less rigorous and challenging with respect to how they prepare students in non-theological subjects.

Theological seminaries train students to instruct others in a particular doctrinal tradition and mode, usually for careers within that tradition as ministers, priests, imams, etc.²¹ A classic example, Princeton Theological Seminary, states its mission as preparing “women and men to serve Jesus Christ in ministries marked by faith, integrity, scholarship, competence, compassion, and joy, equipping them for leadership worldwide in congregations and the larger church, in classrooms and the academy, and in the public arena.”²² One of its “four distinctive commitments” is a “community of

The “Limitations” Clause in the 1940 Statement of Principles, 74 *ACADEME* 52, 53 (1988) (quoting M. PATTILLO, JR. & D. MACKENZIE, *EIGHT HUNDRED COLLEGES FACE THE FUTURE* (1965)).

20. Wilson, *supra* note 15, at 415.

21. *Seminary*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/175684?rskey=AFTceN&result=1&isAdvanced=false#eid> (last visited June 20, 2016).

22. *Mission & Vision*, PRINCETON THEOLOGICAL SEMINARY, <http://www.ptsem.edu/discover/mission-vision> (last visited Oct. 20, 2018).

learning [that] nurtures intellectual curiosity and fosters theological research.”²³

Hyles-Anderson College identifies not as a seminary but as a “Bible college.”²⁴ It has the goal of producing “well-rounded servant leaders who will do great works for God” through majors in only Bible and mission studies, elementary and secondary education, music, media, secretarial studies, and marriage and motherhood.²⁵ Its other educational offerings—minors; one-, two-, and three-year programs; and graduate degrees—are equally limited, bounded to the same subjects as the major offerings.²⁶

But most of America’s religious universities and colleges have looser ties with religion and train students in secular disciplines—from the sciences to the liberal arts. These institutions themselves range from covenantal schools, which expressly integrate religious belief into degree programs;²⁷ to religiously affiliated schools where the primary religious influence may be the common religious identity of the campus community, not the content of class discussions;²⁸ to nominally religious schools, which may have cut formal ties to their historical religious roots or maintain that relationship in name only.

Many of the clashes of values between a university’s religious freedom and its faculty’s academic freedom occur at covenantal schools. Covenantal universities and colleges seek to train students for careers in a large number of secular disciplines, while integrating faith into the everyday experience of its students through “[c]hapel and worship services, student-led Bible studies, and conversations over coffee with a Campus Ministries chaplain.”²⁹ A covenantal school, like Calvin College in Grand Rapids, Michigan, does not see its general educational mission as divorced from its education of students in the faith—quite the contrary, the university’s stated goal is to equip students “to think deeply, to act justly, and to live wholeheartedly as Christ’s agents of renewal in the world.”³⁰

23. *Id.*

24. *About Hyles Anderson College*, HYLES-ANDERSON COLLEGE, <https://hylesanderson.edu/about/> (last visited Oct. 20, 2018).

25. *Id.*; *Academic Department*, HYLES-ANDERSON COLLEGE, <https://hylesanderson.edu/programs-and-courses/> (last visited Oct. 19, 2018).

26. *Id.*

27. *See, e.g., Our Purpose*, COVENANT COLLEGE, <https://www.covenant.edu/about/who/purpose> (last visited Oct. 20, 2018); *see also* Kaye Cook & Cynthia Neal Kimball, *Is a Christian College Education ‘Worth It’? Worldview Development Among Christian College Students as a Model for the Larger Academy*, GORDON COLLEGE (2011), <http://www.gordon.edu/download/pages/Is%20a%20Christian%20College%20Education%20Worth%20it.pdf>.

28. *See, e.g., Mission*, UNIV. OF NOTRE DAME, <https://www.nd.edu/about/mission/> (last visited Oct. 20, 2018).

29. *Faith and Worship*, CALVIN COLLEGE, <https://calvin.edu/student-life/faith-worship/> (last visited Oct. 19, 2018).

30. CALVIN COLLEGE, *supra* note 4.

Wheaton College places a similar emphasis on faith in its educational offerings: its website declares, it is “an explicitly Christian, academically rigorous, fully residential liberal arts college and graduate school.”³¹ Part and parcel of this identity is Wheaton College’s doctrinal statement of faith, which “defines the biblical perspective that informs a Wheaton education.”³² “Reaffirmed annually by its Board of Trustees, faculty, and staff,” the statement dates back to 1924 and sets forth Wheaton’s view of the nature of God, the creation, the relevance of scripture, the centrality of Jesus Christ, and the afterlife.³³ Wheaton College maintains a video series about how its faith statement integrates with the academic pursuits of its faculty.³⁴

For some schools with religious pasts or present-day connections to religious communities, their educational mission and the academic freedom of their faculty go hand in hand. The University of Notre Dame, for example, places its educational mission in context of three characteristics of Roman Catholicism: “Jesus Christ, his Gospel, and his Spirit.”³⁵ But “[w]hat the University asks of all its scholars and students . . . is not a particular creedal affiliation, but a respect for the objectives of Notre Dame and a willingness to enter into the conversation that gives it life and character.”³⁶ Notre Dame believes that “no genuine search for the truth in the human or the cosmic order is alien to the life of faith.”³⁷ Not surprisingly, then, Notre Dame “insists upon academic freedom [because] that makes open discussion and inquiry possible.”³⁸

This commitment to academic freedom does not mean that the university is emptied of serious scholars of Catholicism or of its Catholic identity. Notre Dame’s Catholic identity “depends upon, and is nurtured by, the continuing presence of a predominate number of Catholic intellectuals.”³⁹ In the “free inquiry and open discussion” Notre Dame fosters, “various lines of Catholic thought may intersect with all the forms of knowledge found in the arts, sciences, professions, and every other area of human scholarship and creativity.”⁴⁰ As a Catholic institution, faith commitments infuse many

31. WHEATON COLLEGE, *supra* note 8.

32. *Statement of Faith and Educational Purpose*, WHEATON COLLEGE, <https://www.wheaton.edu/about-wheaton/statement-of-faith-and-educational-purpose/> (last visited Oct. 20, 2018).

33. *Id.*

34. *Statement of Faith Video Series*, WHEATON COLLEGE, <https://www.wheaton.edu/about-wheaton/statement-of-faith-and-educational-purpose/statement-of-faith-series/> (last visited Oct. 20, 2018).

35. UNIV. OF NOTRE DAME, *supra* note 28.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

of Notre Dame's operational decisions.⁴¹ In its "pursuit and sharing of truth for its own sake,"⁴² Notre Dame has become one of the most prestigious universities in the country,⁴³ topping charts for the number of fellowships,⁴⁴ grants,⁴⁵ and research awards.⁴⁶

However, many religiously affiliated colleges and universities leave considerably less room for dissenting opinion than Notre Dame does, at least on matters of religious doctrine. And this brings us to the nub of the clash: when should a religious educational institution's desire to advance its religious mission through teaching and scholarship, which in many cases is its *raison d'être*, yield to providing its faculty with academic freedom, even when doing so results in scholarship the institution considers heretical, blasphemous, or profane? Is there a place for the institution shaping and binding its own community to its religious commitments?

Covenantal schools occupy a unique position in society. As Professor Carter puts it, they sit squarely on top of the wall of separation between church and state; from this vantage point, they can view and participate in conversations happening on either side of the wall.⁴⁷ More importantly, covenantal schools can act as mediators in society—fluent enough in both sectors of society to translate the experience of the sectarian to the secular and the secular to the sectarian, in languages that both understand.⁴⁸

41. For example, after the contraceptive coverage mandate under the Patient Protection and Affordable Care Act ("ACA") went into effect, Notre Dame first sued for an exemption from the mandate, lost the lawsuit, and in 2014 began providing birth control to students. Emma Green, *Notre Dame Switches Its Position on Birth-Control Coverage—Again*, THE ATLANTIC (Feb. 7, 2018), <https://www.theatlantic.com/politics/archive/2018/02/notre-dame-switches-its-position-on-contraception-coverage-again/552605/>. After the Trump administration's issuance of new rules under the ACA in 2017, Notre Dame reversed course, availing itself of the religious accommodation. *Id.* It then experienced a backlash from discontinuing coverage; just a month later, Notre Dame again began providing some forms of birth control. *Id.* Litigation currently ensues over Notre Dame's decision to not provide all forms of contraception to its students. Erin B. Logan, *Students Sue University of Notre Dame for Restricting Access to Some Birth Control*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/06/27/students-sue-university-of-notre-dame-for-restricting-access-to-some-birth-control/?utm_term=.883e452d5832.

42. Univ. of Notre Dame, *supra* note 28.

43. *University of Notre Dame*, U.S. NEWS, <https://www.usnews.com/best-colleges/notre-dame-1840/overall-rankings> (last visited Oct. 20, 2018) (ranking Notre Dame eighteenth nationally).

44. *Notre Dame Research*, UNIV. OF NOTRE DAME, <https://research.nd.edu/> (last visited Oct. 20, 2018) (the university has been ranked first in the nation for National Endowment for the Humanities fellowships since 1999).

45. *This Is Notre Dame*, UNIV. OF NOTRE DAME (2017–18), <https://www.nd.edu/assets/docs/this-is-notre-dame.pdf> (Notre Dame maintains thirty-one grants in twenty-four countries, totaling \$18 million.)

46. *Id.* (in fiscal year 2017 alone, Notre Dame pulled in \$138 million in research awards.)

47. Stephen L. Carter, *The Constitutional and the Religious University*, 47 DEPAUL L. REV. 479, 494–95 (1998).

48. *Id.*

Covenantal universities are the sites for inscribing and strengthening a particular worldview in young adults belonging to a particular faith tradition, making their operation a matter of existential concern.⁴⁹ As Professor Michael McConnell observed, these universities are the means “by which religious faiths can preserve and transmit their teachings from one generation to the next, particularly for nonmainstream religions whose differences from the predominant academic culture are so substantial that they risk annihilation if they cannot retain a degree of separation.”⁵⁰ These universities also act as a unique meeting ground for individuals interested in romantic and marital partners with the same faith commitments, which itself is essential to transmitting faith across generations.⁵¹ But to perform these functions, the university at a minimum needs everyone singing from the same sheet of music, theologically. Nothing less is at stake than “the ability of nonmainstream religions to maintain their identity and proclaim their vision in secular America.”⁵²

This push and pull around secular and sectarian commitments at covenantal schools is very real. Institutionally, university leaders are often accountable to religious leaders or even board members who share that faith tradition, creating a significant push toward orthodoxy and adherence to doctrine.⁵³ Universities and colleges are also evaluated by organizations, like the AAUP, dedicated to individual academic freedom, and may be “censured”—that is, called out publicly—if the institution subjects a faculty member to sanction for taking an independent stand in their work.

Moreover, if a school of higher education tacks too hard towards functioning only as a seminary or Bible college, it loses the dual role of preparing young believers to assume influential roles in secular society. Conversely, if a covenantal university tacks too hard in the direction of preparing students in everything but the faith, it no longer can perform its

49. Robin Fretwell Wilson, *Introduction*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 10 (Robin Fretwell Wilson ed., 2018).

50. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 304 *L. AND CONTEMP. PROB.* 303, 316 (1990).

51. Cara Newlon, *College Students Still Often Find Spouses on Campus*, USA TODAY (Oct. 17, 2013), <https://www.usatoday.com/story/news/nation/2013/10/15/college-marriage-facebook/2989039/>; Katherine Burgess, *Looking to Get Married? Try a Christian College*, WASH. POST (Oct. 11, 2013), https://www.washingtonpost.com/national/on-faith/looking-to-get-married-try-a-christian-college/2013/10/11/ef6fed4c-32b3-11e3-ad00-ec4c6b31cbcd_story.html?utm_term=.65f8c6570d76 (“[O]f the top 25 colleges where men are most likely to meet their spouse, all are private Christian institutions. For women, more than half (64 percent) of the top 25 colleges where they’re likely to find a husband are religious schools.”).

52. McConnell, *supra* note 50, at 304.

53. See, e.g., Kevin Baird, *An Open letter to President David Wright (Indiana Wesleyan University)*, TRUE DISCIPLES (Mar. 1, 2016), <http://drkevinbaird.com/wp/2016/03/01/an-open-letter-to-president-david-wright-indiana-wesleyan-university/>.

function of transmitting faith across generations—at a moment when more conservative faith traditions feel unsure of their place in society.⁵⁴

Professor Carter captured how delicate and precarious the position of covenantal universities is with a metaphor of the covenantal university sitting atop the wall between the “garden”—a sectarian place not of the world—and the “wilderness,” the world most of us occupy:

[T]he risk is real for any school that allows, as Lovejoy put it, “ecclesiastical authority” to decide what propositions its faculty members may or may not defend: the risk is that the school will tumble off the wall into the garden. The garden is not a bad place to be, and dwelling there may well be better than dwelling in the wilderness. But if a university is in the garden only, it can never fulfill its mediating role of translating each for the other.⁵⁵

Professor Tom Berg has labelled such universities that have one foot in the world and the other foot out of the world “partly acculturated.”⁵⁶ Professor Berg believes such organizations are positioned to do significant work, providing education and social services, because their focus is set, at least partly, toward the outside world.

This essay considers only one of the many collisions in this zone of risk⁵⁷ for covenantal universities straddling these two spheres—struggles about the very religious understandings foundational to the universities themselves.

54. Charles Mathewes, *White Christianity Is in Big Trouble. And It's Its Own Biggest Threat.*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/19/white-christianity-is-in-big-trouble-and-its-own-biggest-threat/?utm_term=.2d65e7bd2328 (noting “Christians’ fears about losing control of the culture”); Kelsey Dallas, *Conservative Christians and Religious ‘Nones’ Fear Each Other, But It’s More About Politics Than Faith*, DESERET NEWS, (Sept. 7, 2017), <https://www.deseretnews.com/article/865688296/Conservative-Christians-and-religious-nones-fear-each-other-but-its-more-about-politics-than.html> (“Around half of evangelicals say that . . . atheists want to limit their freedom. . .”).

55. Carter, *supra* note 47.

56. See generally Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341 (2016).

57. The AAUP polices many aspects of the relationship between universities and their faculty. See, e.g., *AAUP Adds University of Nebraska-Lincoln to Censure List for Violations of Principles*, AAUP (June 16, 2018), https://www.aaup.org/news/aaup-adds-university-nebraska%E2%80%9393lincoln-censure-list-violations-principles#_W5rj9pNKiuU (deeming a university to have violated academic freedom for suspending and failing to reinstate a doctoral student with a part-time appointment following her protest of an on-campus recruitment table for a political organization); see also *Academic Freedom and Tenure: University of the Cumberland*, AAUP (Mar.–Apr. 2005), at 108, https://www.aaup.org/file/Academic-Freedom-and-Tenure-University-of-the-Cumberlands_0.pdf (criticizing a university’s academic freedom statements in its policies and procedures as being subject to abuse); *Academic Freedom and Tenure: The University of Southern Maine*, AAUP (2015), at 14, <https://www.aaup.org/file/USM%20report.pdf> (last visited Oct. 20, 2018) (discussing possible administrative retaliation against faculty members who had voiced criticism of the administration).

III. WHEN ACADEMIC FREEDOM AND RELIGIOUS FREEDOM OVERLAP AND DIVERGE

Both the university and its professors possess academic freedom as well as religious freedom, or would like to. Sometimes these protections overlap or align; other times, they diverge, as Table 1 graphically illustrates.

TABLE 1
OVERLAPPING AND DIVERGING PROTECTIONS

Faculty	University
Box 1. Religious Freedom	Box 2. Religious Freedom
Box 3. Academic Freedom	Box 4. Academic Freedom

Statutory law has long protected the religious beliefs or practices of individuals and, although controversial, institutions.⁵⁸ Like these legal protections, “[a]cademic freedom . . . has two faces: one individual, the other institutional.”⁵⁹ These aspects, Boxes 3 and 4, align when outside forces attempt to control the scope or content of research done by individual faculty: such a move “takes away the scholar’s freedom of research or teaching, and it also takes away the institution’s exclusive authority to govern academic matters within its walls.”⁶⁰

During the McCarthy era, for instance, institutional academic freedom shielded not only institutions but their faculty members—that is, Boxes 3 and 4 aligned.⁶¹ Thus, when the House Un-American Activities Committee stirred public opinion against communism, several Harvard University faculty members were accused of being communists.⁶² Senator Eugene McCarthy called upon Harvard to fire one especially vocal professor, Wendell Furry.⁶³ Harvard’s president said he could not promise that⁶⁴ and denied

58. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 5 (2010) (“A recent survey of federal and state law revealed that the terms ‘religion’ or ‘religious’ appear over 14,000 times, and religious exemptions appear in over 2,000 statutes.”); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–50 (1992) (same). For reviews of, and a range of views on, protections for individual religious freedom versus institutional religious freedom, see THE RISE OF CORPORATE RELIGIOUS LIBERTY 257 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., Oxford University Press, 2016).

59. McConnell, *supra* note 50, at 305.

60. *Id.*

61. *Id.* (“In such a case, the two aspects of academic freedom are in harmony.”).

62. Ben W. Heineman, Jr., *The University in the McCarthy Era*, THE HARVARD CRIMSON (Sept. 22, 1965), <https://www.thecrimson.com/article/1965/9/22/the-university-in-the-mccarthy-era/>.

63. *Id.*

64. Jeff Magalif, *Pusey’s Non-Defense of Academic Freedom*, THE HARVARD CRIMSON (Sep. 21, 1970), <https://www.thecrimson.com/article/1970/9/21/puseys-non-defense-of-academic-freedom-psenator/>.

knowledge of any communists on Harvard's faculty.⁶⁵ Harvard's assertion of its exclusive authority to govern the breadth of operations within its walls aligned with the individual academic freedom interests of its professors, whatever their opinions of communism. These faculty members held onto their positions at Harvard.

Other institutions gave greater heed to McCarthy's accusations. City College of New York ("CUNY"), for instance, dismissed a handful of professors after McCarthy named them as communists.⁶⁶ One can think of this pitiable outcome as a crushing of CUNY's academic freedom (Box 4) that also left unprotected CUNY's professors' individual academic freedom (Box 3).

In other instances, a university may assert both a religious freedom prerogative to shape its own operations consonant with its faith tenets and an academic freedom right to do so, too—Boxes 2 and 4 in Table 1. In such instances, the university as an entity may be in conflict with prevailing norms in the academy or society at large. For instance, some medical schools object to teaching their students how to perform an abortion, a claim that sounds both in religious freedom and academic freedom.⁶⁷ Schools that take this stance risk being perceived as out of step with the profession, or worse, as illegitimate and unworthy of accreditation because students graduate without being trained for the full range of services they may be called upon to perform. However, in 1996, Congress chose to protect medical schools' ability to follow their missions by passing the Coats/Snowe Amendment.⁶⁸ That law insulated medical schools from repercussions by the federal government and private accreditation organizations if a school chose not to teach their students how to perform abortions.⁶⁹ The Coats/Snowe Amendment serves as an example of institutional religious

65. *Pusey Answers Communism Charge; McCarthy to Cite Furry for Contempt*, THE HARVARD CRIMSON (Nov. 10, 1953), <https://www.thecrimson.com/article/1953/11/10/pusey-an-swers-communism-charge-mccarthy-to/>.

66. Paul L. Montgomery, *10 Teachers Ousted in 50's Given Restitution from City*, N.Y. TIMES (Apr. 29, 1982), <https://www.nytimes.com/1982/04/29/nyregion/10-teachers-ousted-in-50-s-given-restitution-from-city.html>.

67. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (finding coverage requirement of drugs or devices the objecting closely held corporations viewed as abortifacients to be a burden on the closely held corporations' religious practice for purpose of the federal Religious Freedom Restoration Act); Kira Brekke, *Med Schools Vary on Abortion Instruction*, THE GW HATCHET (Mar. 2, 2010) <https://www.gwhatchet.com/2010/03/29/med-schools-vary-on-abortion-instruction/>.

68. 42 U.S.C. § 238n (1996).

69. *Id.* ("In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standards that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or

liberty receiving statutory protection despite intellectual disagreement in the academy at large, vindicating both the school's religious freedom (Box 2) and its academic freedom (Box 4). Obviously, if a faculty member feels strongly that all physicians should know how to care for women needing an abortion, say in cases of miscarriage or for personal desire, that faculty member's academic freedom may be infringed.⁷⁰ And if the faculty member believes this for religious reasons, the faculty member's religious liberty arguably has been infringed⁷¹—that is, in the name of the school's own academic freedom, the school chooses precisely what it will educate (and not educate) students about.

But disagreements like those between Wheaton College and Hawkins implicate Wheaton's religious and academic freedom (Boxes 2 and 4) as well as the academic freedom (Box 3) and even religious freedom (Box 1) of faculty like Hawkins.⁷² As the next Part shows, when Hawkins uttered the words "Muslims . . . are people of the book"⁷³ and her employer, Wheaton, objected to the statement as not "accept[ing] and model[ing] the Statement of Faith of the College and/or the Community Covenant," which details Wheaton's view of the nature of God,⁷⁴ Title VII sides with Wheaton—adding to the thick autonomy of religious organizations to decide who speaks for them on religious matters, a principle crystallized by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*⁷⁵

other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.”).

70. *A Doctor Tells Why She Performed Abortions—And Still Would*, HEALTH AFFAIRS (June 2010), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2009.0775> (noting that “there aren’t any conscience rules in place to protect people who, if their home institution believes otherwise, provide medications or procedures they believe would save a life—the mother’s”).

71. Cf. Frederick Mark Gedicks, *Exemptions from the ‘Contraception Mandate’ Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014), https://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html?noredirect=on&utm_term=.667335615c60.

72. Of course, Hawkins may have had a statutory claim against Wheaton if state law like that in Utah had given her protection for speech in the workplace. See Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise*, UNIV. CONN. L. REV. (forthcoming 2018) (“Utah provided that lawful, non-harassing speech about an employee’s religious, moral, or political beliefs, whether expressed inside or outside the workplace, cannot be the basis for taking action against an employee.”); Utah Code § 34A-5-112 (2018). To our knowledge, Illinois has no such law.

73. Wilson, *supra* note 72.

74. *Id.*; Ruth Graham, *The Professor Wore a Hijab in Solidarity—Then Lost Her Job*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/16/magazine/the-professor-wore-a-hijab-in-solidarity-then-lost-her-job.html>.

75. 565 U.S. 171 (2012). Wheaton and Hawkins ultimately reached a settlement to “part ways” after finding “a mutual place of resolution and reconciliation.” Christine Hauser, *Wheaton College and Professor to ‘Part Ways’ After Her Remarks on Muslims*, N.Y. TIMES (Feb. 8, 2016), <https://www.nytimes.com/2016/02/09/us/larycia-hawkins-wheaton-college.html>.

IV. SOURCES OF INSTITUTIONAL RELIGIOUS LIBERTY

To probe the appropriateness of academic freedom's reach into institutional religious liberty, it is important to understand the backdrop of long-standing laws providing religious liberty protections to religious employers and religious universities in particular.

A. *Constitutional Sources of Institutional Religious Liberty*

As a result of the U.S. Supreme Court's much-debated decision in *Employment Division v. Smith*,⁷⁶ religious individuals and institutions must follow general rules of neutral applicability like every other person covered by a law. Thus, for most actions (absent statutory protections), religious actors have little recourse under the First Amendment against burdens on their religious practice.⁷⁷ But in one significant realm—who speaks for churches and religious institutions on matters of faith—the First Amendment's Religion Clauses creates a zone of autonomy.⁷⁸

Thus, in *Hosanna-Tabor*,⁷⁹ the Court held that the ministerial exception, grounded in the First Amendment's Establishment and Free Exercise Clauses, applies to a “called teacher” who works in a church-affiliated school, barring recovery against the school under the Americans with Disabilities Act. The lawsuit, brought by the Equal Employment Opportunity Commission (“EEOC”) on behalf of Cheryl Perich, an elementary school teacher, arose after Perich and the school disagreed on accommodations the school made for Perich's narcolepsy.⁸⁰ The school believed the dispute should be mediated, not litigated, because “Christians should resolve their

76. 494 U.S. 872 (1990). Whether the *Smith* decision was correctly decided or encroached improperly on free exercise remains a deeply contested question. See, e.g., Douglas Laycock, *The Religious Exemption Debate*, 11 *RUTGERS J. L. & RELIGION* 139, 150 (contemplating the effects of *Smith*); Symposium, *Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 *CARDOZO L. REV.* 1655 (2011) (discussing *Smith*).

77. Of course, one cannot target religious actors or impose special burdens upon them without facing strict scrutiny review, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), nor can courts disparage religious groups and individuals when adjudicating the application of laws—the latter are entitled to “fairness and impartiality” and a “neutral decision-maker who would give full and fair consideration to [their] religious objection[s].” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–32 (2018).

78. *Hosanna-Tabor*, 565 U.S. at 188–90, 193–94.

79. See *id.*

80. *Id.* at 178–79. The school gave Perich disability leave for an entire school year, arranging coverage by another teacher during Perich's absence. *Id.* Halfway through the school year, Perich informed the school she was ready to come back. *Id.* The school was concerned Perich was not yet ready to return and explained that the substitute teacher's contract extended to the end of the school year. *Id.* Perhaps because of the unfortunate situation, the congregation supporting the school “offered to pay a portion of Perich's health insurance premiums in exchange for her resignation as a called teacher.” *Id.* But Perich refused to resign; talks with the school deteriorated as she threatened to sue, resulting in her termination. *Id.*

disputes internally.”⁸¹ The EEOC sued the school for disability discrimination after the school terminated Perich for threatening to sue the school.⁸² The unanimous decision rested in significant part on the teacher’s status as a “called teacher,” which was based on an overall assessment of the teacher’s role—teaching “a religion class four days a week,” leading “students in prayer and devotional exercises each day,” and leading chapel service “about twice a year”⁸³—and on the church’s own understanding of that role.⁸⁴ In allowing the termination to stand,⁸⁵ the Court also cited a non-entanglement principle that gives space to religious actors on core questions of the faith: “[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”⁸⁶ Here, if the Court had decided Perich was not a minister for purposes of the “ministerial exception,” as some had urged,⁸⁷ it may have determined the school encroached on her contract rights—the Court expressly reserved the question of whether the ministerial exception “bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”⁸⁸ But because Perich was a called teacher, “requiring the Church to accept a minister it did not want . . . would have plainly violated the Church’s freedom under the Religion Clauses to select its own ministers.”⁸⁹

This non-entanglement principle has been used to dispatch claims of discrimination against religious employers on other grounds. For example, in *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*,⁹⁰ a private Catholic school fired a female teacher after she signed her name to a pro-choice advertisement in a local newspaper. She sued for sex discrimination in violation of Title VII, alleging that the school did not fire men for similar departures from Church doctrine, such as engaging in anti-war

81. *Id.* at 180.

82. *Id.*

83. *Id.* at 178.

84. *Hosanna-Tabor*, 565 U.S. at 177–80.

85. *Id.* at 192.

86. *Id.* at 185–86 (quoting *Watson v. Jones*, 80 U.S. 679, 727 (1871)).

87. See Marci Hamilton, *The Ministerial Exception Makes It to the Supreme Court*, PATHEOS (Mar. 31, 2011), <http://www.patheos.com/resources/additional-resources/2011/03/ministerial-exception-makes-it-to-the-supreme-court-marci-hamilton-04-01-2011> (observing that “[i]f the church school wins this case, which it should not, I think that Congress and the state legislatures owe it to potential employees of religious institutions to warn them of their lack of protection from invidious discrimination. Most come into such institutions expecting that they will receive better treatment than your average corporation. Without such a warning, employees unwittingly place themselves in a position of weakness and risk at work []” and calling strongly for disclosure in the employer’s employment contracts).

88. *Hosanna-Tabor*, 565 U.S. at 196.

89. *Id.* at 194.

90. 450 F.3d 130 (3d Cir. 2006).

speech.⁹¹ The United States Court of Appeals for the Third Circuit declined to review the teacher's firing because doing so "would require an analysis of Catholic doctrine" about the inherently religious questions of "when life begins and the responsibility to preserve life *in utero*."⁹² Even if it could engage in a principled adjudication of the case, the Court observed, "the process of the review itself might be excessive entanglement."⁹³

The academic freedom struggles like those between Wheaton and Hawkins implicate the non-entanglement principle. At bottom, the clash of views between Wheaton and Hawkins concerned a question of theology, with Hawkins taking one position and Wheaton another. Had the parties not reached an agreement, reviewing whether Hawkins had a contractual or other claim against Wheaton⁹⁴ may entangle the courts into religious disputes they cannot referee.⁹⁵ This non-entanglement principle animates the structure of religious "exemptions" from the general duty of covered employers not to discriminate on religious grounds under Title VII, as the next subpart explains.

B. Statutory Sources of Institutional Religious Liberty

Statutory exemptions in civil rights laws preserving the ability to self-govern in certain key respects act as a second bulwark around religious liberty. Most notable here are explicit protections in Title VII to hire co-religionists and a categorical exemption in Title IX for universities to operate in accordance with the university's own religious tenets.

1. Title VII

Consider first Title VII, which bans discrimination on the basis of race, color, religion, sex, or national origin.⁹⁶ Section 702(a) provides "This title shall not apply to . . . educational institutions . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."⁹⁷ That specific statutory protection acts to

91. *Id.* at 132.

92. *Id.* at 140 (quoting *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 344 F. Supp. 2d 923, 934 (D. Del. 2004)).

93. *Id.* at 139 (quoting *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991)).

94. Some covenantal universities in their employee handbooks provide that "[n]o teaching or support of a position inconsistent with these Articles of Faith will be tolerated on the part of any employee of the University." BIOLA UNIV., BIOLA UNIVERSITY EMPLOYEE HANDBOOK § 1.2, at 3 (rev. 2014), <http://offices.biola.edu/hr/ehandbook/static/media/pdf/1.2.pdf>. Such a statement presumably provides sufficient notice for faculty under the AAUP's guidance, but would not provide notice to prospective students. *See* Part VI.

95. One should recognize how unprotected and exposed this leaves employees of faith-based groups—like ministers themselves—when they take a view contrary to church authorities. *See* Hamilton, *supra* note 87.

96. Wilson, *supra* note 15, at 403.

97. 42 U.S.C. § 2000e-1 (2012).

place religious employers—which would otherwise be barred from making hiring and retention decisions on a religious basis—in the same position as other employers that take seriously the ideological commitments of their workers to the organization’s core values, as many environmental advocacy or women’s rights groups do.⁹⁸ Moreover, while a worker’s private religious beliefs are simply not germane to their ability to, say, work at Whole Foods or eBay, or the overwhelming majority of employers in the U.S., this protection reflects Congress’ judgment that for religious employers, the religious views of those working for the organization are germane.

In other words, educational institutions are exempted from Title VII’s ban on religious discrimination in the workplace because they need to “discriminate” in employment decisions to hire a workforce whose values match their values and mission. Importantly, religious institutions receive a defense to claims of religious discrimination, but not a categorical exemption from all discrimination claims—they cannot discriminate on the basis of sex or other protected classes under Title VII.⁹⁹

Section 703(e)(2) provides a second statutory protection for religiously affiliated universities:

[I]t shall not be an unlawful employment practice for a . . . university . . . to hire and employ employees of a particular religion if such . . . university . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such . . . university . . . is directed toward the propagation of a particular religion.¹⁰⁰

This section protects the ability for religious educational institutions that use their curricula to propagate the faith—much as Wheaton does—to hire only persons who share its articles of faith.¹⁰¹ It also protects religiously affiliated universities that are controlled by religious groups even if the school does not infuse faith in every dimension of its operations.¹⁰² Section

98. It is nonsensical, for example, for Planned Parenthood to be required to retain an employee who is virulently opposed to abortion. See Michelle L. Price, *LGBT Anti-discrimination Bill Passes Utah Test*, PBS NEWS (Mar. 6, 2015), <https://www.pbs.org/newshour/nation/lgbt-anti-discrimination-bill-passes-utah-test> (quoting Professor Robin Fretwell Wilson as saying, “If, for example, I worked at Planned Parenthood, it would be totally appropriate for them to say you can’t wear one of those little buttons that has the ‘Right to Life,’ with the fetus on it”).

99. 42 U.S.C. §§ 2000e-2, 2000e-3 (2012). See generally Wilson, *supra* note 15.

100. 42 U.S.C. § 2000e-2(e) (2012).

101. For an explanation of how the exemptions from Sections 702 and 703 overlap with the other protected grounds in Title VII, see Wilson, *supra* note 15, at 446 n.291.

102. Some have argued that Title VII extends a categorical religious exemption, relying on cases like *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2011), which interpreted the term “employment” broadly under Section 702(a) to reach all employment actions, including retaliation suits brought against religious employers, which the Court found were barred. Carl Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue To Staff on a Religious Basis?*, 2015 OXFORD J.L. & RELIGION 368, 380 (“the logic of *Kennedy* necessarily applies to claims for discrimination on the basis of race, colour,

703(e)(2)'s protection also operates as a defense to claims of "religious discrimination," permitting religious universities to define and shape their communities—not only their educators, but their administration and staff—by adherence to particular theological commitments. In other words, covenantal universities can require that everyone drink the same theological Kool-Aid.

Cases decided under Sections 702(a) and 703(e) from federal courts across the country show the strength of Title VII's protections. In *Killinger v. Samford University*,¹⁰³ for instance, a professor at Samford University's divinity school who taught undergraduate religion classes was dismissed from his post in the divinity school because he did not share the same religious views as the divinity school dean, views the professor called "fundamentalist."¹⁰⁴ The professor sued Samford, alleging religious discrimination.¹⁰⁵ The university countered that Sections 702(a) and 703(e)(2) empowered it to take action against the professor on religious grounds. The U.S. Court of Appeals for the Eleventh Circuit concluded the university was right—both sections allowed the university to make employment decisions on religious grounds as a means of preserving its religious mission.¹⁰⁶ In reaching this decision, the Eleventh Circuit recognized, "We, as a federal court, must give disputes about what particulars should or should not be taught in theology schools a wide-berth."¹⁰⁷

In *Little v. Wuerl*,¹⁰⁸ a Catholic secondary school chose not to renew a Protestant teacher's contract because she had divorced her husband and remarried outside of the "proper canonical process available from the Roman Catholic Church."¹⁰⁹ The U.S. Court of Appeals for the Third Circuit dismissed the teacher's lawsuit, which had alleged only religious discrimination, on summary judgment; the Court found the school was motivated by its religious belief about resolving marital disputes within the Church.¹¹⁰ The school's employment contract stated:

Teacher recognizes the religious nature of the Catholic School and agrees that Employer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights that the Teacher

sex, or national origin"). This argument fails to take into account the limiting terms of Title VII's exemptions. *Wilson supra* note 15, at 446 n.291. Moreover, as noted below, courts have allowed suits on protected grounds other than religion to proceed to trials on the merits.

103. 113 F.3d 196 (11th Cir. 1997).

104. *Id.* at 198.

105. *Id.*

106. *Id.* at 199–201.

107. *Id.* at 201.

108. 929 F.2d 945 (3rd Cir. 1991).

109. *Id.* at 946.

110. *Id.* at 951.

may have hereunder, subject, however, to the personal due process rights promulgated by the Roman Catholic Church.¹¹¹

In applying Title VII's religious exemptions, the Court found that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."¹¹² Although the legislative history of Section 703(e)(2) "never directly addresses the question of whether being 'of a particular religion' applies to conduct as well as formal affiliation," an exchange with the exemption's sponsor showed that Congress was "solicitous of religious organizations' desire to create communities faithful to their religious principles."¹¹³

In *Kennedy v. St. Joseph's Ministries, Inc.*,¹¹⁴ a nursing assistant, a member of the Church of the Brethren, wore long dresses and skirts and a cover for her hair, consistent with her faith.¹¹⁵ The hospital told the nursing assistant her attire was inappropriate for a Catholic facility.¹¹⁶ After the nursing assistant refused to change her attire, she was fired.¹¹⁷ She alleged she was retaliated against for violating the hospital's dress code.¹¹⁸ The U.S. Court of Appeals for the Fourth Circuit interpreted Section 702(a) broadly to reach all employment actions, barring the nursing assistant's retaliation suit.¹¹⁹

As noted above, non-entanglement concerns also insulate from scrutiny employment decisions by religious schools. In *Curray-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*,¹²⁰ the Court concluded "that if we were to consider whether . . . opposing the war in Iraq is as serious a challenge to Church doctrine as is promoting a woman's right to abortion, we would infringe upon the First Amendment Religion clauses."¹²¹

Still, if an employer treats comparable employees differently after substantially similar conduct, "[r]equiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful."¹²² Hard questions have arisen about the extent of these protections when a claim is brought on another protected

111. *Id.* at 945.

112. *Id.* at 951.

113. *Id.* at 950.

114. 657 F.3d 189 (4th Cir. 2011).

115. *Id.* at 190.

116. *Id.* at 191.

117. *Id.*

118. *Id.*

119. *Id.* at 192–95.

120. 450 F.3d 130 (3d Cir. 2006).

121. *Id.*

122. *Id.* at 141.

ground, such as discrimination on the basis of sex.¹²³ But the lesson of such Title VII cases is clear: if a religious employer is alleged to take an adverse action against an employee or prospective employee on a protected ground other than religion (such as sex), and the employee makes a prima facie case, the courts will not dispatch the claim on summary judgment *even if the employer defends on religious grounds*.¹²⁴ Instead, the dispute will go to trial over whether the stated ground for the action, a religious tenet, was in fact that actual ground for the action or was mere pretext for acting on an illicit prohibited ground.

2. Title IX

A similar zone of autonomy for religious values appears in Title IX of the Education Amendments of 1972. Title IX generally bans sex discrimination in any educational program or activity that receives federal financial assistance but makes special allowance for the religious commitments of a

123. The heart of these questions buds from an interpretation of “sex,” and whether it includes sexual orientation and gender identity (“SOGI”) discrimination. *See generally* Wilson, *supra* note 15; Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373 (2017) [hereinafter *Nonsense*]; Robin Fretwell Wilson & Bill Eskridge, Jr., *Introduction*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (Bill Eskridge, Jr. & Robin Fretwell Wilson, eds., Cambridge Univ. Press 2018). Since the Obama administration, the EEOC has interpreted sex discrimination to include SOGI discrimination, relying on cases like *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Oct. 6, 2018). The EEOC was joined in this by the Department of Justice (“DOJ”) under Attorney General Eric Holder. Eric Holder, Office of the Att’y Gen., Memorandum of the Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>.

However, because the EEOC has no rulemaking authority; its interpretations receive only weak deference known as Auer deference by courts for its interpretation of Title VII. *Auer v. Robbins*, 519 U.S. 452 (1997). But the EEOC is not alone in adopting this interpretation—three federal courts of appeal have come to the same conclusion. *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). The DOJ under Attorney General Jeff Sessions has walked back this interpretation in a formal memorandum and in state litigation (the EEOC has not changed its position). Jefferson Sessions, Office of the Att’y Gen., Memorandum on the Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), <https://www.justice.gov/file/1006981/download>; Debra Cassens Weiss, *Sessions Memo Says Title VII Doesn’t Bar Discrimination Against Transgender People*, ABA JOURNAL (Oct. 6, 2017), http://www.abajournal.com/news/article/sessions_memo_says_title_vii_doesnt_bar_discrimination_against_transgender; *Zarda*, 883 F.3d 100. It is yet to be seen if *Franchina*, *Zarda*, *Hively*, or contrary cases like *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), will spark the Supreme Court to resolve the question. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, would present such an opportunity as sixteen states have filed an amicus brief urging the Court to grant certiorari in the case and arguing that Congress intended “sex” to mean a person’s biological status. 884 F.3d 560 (6th Cir. 2018) *petition for cert. filed*, No. 18-107 (U.S. July 20, 2018), https://www.supremecourt.gov/DocketPDF/18/18-107/60513/20180823153153598_Amicus%20Brief.pdf.

124. *See generally* Wilson, *supra* note 15.

university.¹²⁵ Under Title IX, religious institutions are categorically exempt when the application of Title IX “would not be consistent with the religious tenets of such organization.”¹²⁶ In order to avail oneself of an exemption, however, the Office of Civil Rights (“OCR”) has required schools to seek and receive express waivers of Title IX provisions, identifying how specific faith tenets influence their operations.¹²⁷ During the Obama Administration, OCR maintained a registry of institutions that have been granted waivers.¹²⁸

Seeking exemption through the waiver process took on a greater urgency for some religious colleges and universities after the Obama Administration interpreted Title IX’s ban on sex discrimination to include sexual orientation and gender identity.¹²⁹ Although the Department of Education has never denied a requested waiver to a religious school,¹³⁰ advocacy groups sought the Department of Education’s waiver letters under the Freedom of Information Act and published them. Some saw this greater transparency as exposing “hidden discrimination”; others as attempting to “shame” religious organizations for their beliefs.¹³¹ The Trump Administration has back-walked this practice and the letters no longer prominently appear on the Department of Education’s webpage.¹³²

125. 20 U.S.C. § 1681(a) (2012). Schools are deemed to have received federal financial assistance when employee salaries are federally funded or when students use federal loans to pay for tuition and expenses. Wilson, *supra* note 15, at 397–99.

126. 20 U.S.C. § 1681(a)(3) (2012).

127. 34 C.F.R. § 106.12.31(b) (2018) (“An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.”). The OCR provides guidance about Title IX’s religious exemptions and the procedure to obtain an exemption. OFFICE FOR CIVIL RIGHTS, *Exemptions from Title IX*, U.S. DEPT. OF EDUC. (last modified Nov. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>. That guidance, as maintained by the Trump Administration, however, states that an “institution’s exempt status is not dependent upon its submission of a written statement to OCR,” and that “[r]eligious institutions that have neither sought nor received prior written assurance from OCR [through a written waiver] may still invoke their exemption after OCR receives a Title IX complaint.” *Id.*

128. OFFICE FOR CIVIL RIGHTS, *Religious Exemptions Index*, U.S. DEPT. OF EDUC. (last updated Dec. 31, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html>.

129. OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUC., *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5* (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

130. Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 330 (2016).

131. See generally Wilson, *supra* note 15.

132. Dear Colleague Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017); Andrew Kreighbaum, *Transgender Protections Withdrawn*, INSIDE HIGHER EDUC. (Feb. 23, 2017), <https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections>. The Trump administration has proposed scrapping the letter requirement altogether, automatically granting religious schools waivers from Title IX. See Tyler Kingkade, *Betsy DeVos Wants to Make It Easier for Religious Schools to Avoid*

In waiver requests, some religious colleges have indicated that they infuse their operations with religious values around sex in specific ways across multiple domains—from admissions to housing to locker room facilities—many of which the public might find surprising or problematic. Thus, for example, a private Baptist College in Tennessee, Carson-Newman University, drew fire for requesting an exemption from Title IX “to the extent application of those provisions would not be consistent with the [Southern Baptists Convention’s] religious tenets regarding marriage, sex outside of marriage, sexual orientation, gender identity, pregnancy and abortion.”¹³³ It identified specific conflicts as including Title IX’s general ban on admissions policies that give differential treatment to the sexes and that prohibit marital or parental status discrimination, as well as regulations governing “recruitment,” “comparable facilities, such as restrooms,” and in “athletics” and “housing.”¹³⁴ Most salient here, Carson-Newman’s waiver request extended to maintaining “different rules of behavior or sanctions in education program or activities,” as well as to having different criteria for recruiting, doing pre-employment inquiries about hiring, and retaining persons of different sexes.¹³⁵ It received that waiver.¹³⁶ Asked to explain why it would limit admissions for “gay students, unwed mothers, women [who have] had an abortion and even students who may be pregnant,” Carson-Newman’s president said, “[t]his is who we are.”¹³⁷

Title IX, BUZZFEED NEWS (Sept. 14, 2018), <https://www.buzzfeednews.com/article/tylerkingkade/betsy-devos-religious-exemption-title-ix-discrimination>. Tucked away on OCR’s website is a page labeled “Other Correspondence” which archives letters from OCR to universities that requested a religious waiver between 2017 and 2018, *Other Correspondence*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html> (last modified Sept. 25, 2018), and another page titled “Religious Exemptions Index” that archives letters to and from OCR regarding religious waiver requests prior to 2009, *Religious Exemptions Index*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html> (last modified Sept. 25, 2018).

133. Letter Regarding Claim of Title IX Religious Tenet Exemption from J. Randall O’Brien, President of Carson-Newman Univ., to Catherine E. Lhaman, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (May 1, 2015), <https://www.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/carson-newman-college-request-05012015.pdf>.

134. Many of these requests became more focused during the Obama administration, which treated gender identity as a prohibited ground for discrimination. For an extended discussion of those protections and critique of claims that SOGI nondiscrimination protections are neither warranted nor wise—including whether transgender persons as a group pose heightened safety risks to others (they do not), see *Nonsense*, *supra* note 123.

135. O’Brien, *supra* note 133.

136. Letter Regarding Claim of Title IX Religious Tenet Exemption from Catherine E. Lhaman, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., to J. Randall O’Brien, President of Carson-Newman University (July 10, 2015), <https://ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/carson-newman-response-07102015.pdf> (waiving application of “[Title IX] to the extent that [it] prohibit[s] discrimination on the basis of marital status, sex outside of marriage, sexual orientation, gender identity, pregnancy, or abortion and compliance would conflict with the controlling organization’s religious tenets.”).

137. Lauren Davis, *Carson-Newman University Granted Exemption from Discrimination Laws*, LOCAL 8 NEWS (Dec. 14, 2015, 9:39 PM), <https://www.wvlt.tv/home/headlines/Carson-Newman-University-granted-exemption-from-discrimination-laws-360521761.html>. When con-

As this example shows, practices that in the past remained outside the public eye are now receiving unprecedented scrutiny, in part because Title IX's statutory guarantee was effected through a regulatory process subject to open records laws. These practices have become murkier now that the Department of Education no longer requires explicit waivers or makes university request letters easily findable.¹³⁸ But transparency is crucial to providing notice not only to faculty and staff at a given institution, but to students, who may not fully understand the degree to which an institution of higher education may be operating under sectarian and not secular norms. As one of us has said elsewhere, notice is important to "reduc[e] unfair surprise and hardship."¹³⁹

In short, Title VII's and Title IX's protections mean religious colleges and universities may utilize religious commitments to shape the contours of their academic community by appointing and retaining only professors who share their faith commitments.¹⁴⁰ That Congress has specifically granted this latitude reflects Congress's basic intuition at that time that religious universities are special.¹⁴¹ It is against this strong network of institutional religious liberty protections that the AAUP's work "to advance academic freedom and shared governance"¹⁴² at religious universities takes place.

V. THE AAUP'S TREATMENT OF RELIGIOUSLY AFFILIATED COLLEGES AND UNIVERSITIES

Founded in 1915, the AAUP, a nonprofit membership association of faculty and academic professionals with members at colleges and universi-

fronted with "concern[s] that the exemption technically allows the university to discriminate based on sexual orientation, gender identity (including transgender status), sex outside of marriage, pregnancy and abortion," Carson-Newman University President Dr. J Randall O'Brien stated:" It was a template [that was also "given to several other universities that also filed for exemption"] that I signed and we filed [after the school's legal counsel said that 'the exemption was something the school needed to have on file to operate according to its religious principles'], but frankly I thought it would probably go in a warehouse . . . and [would] probably never [be] seen or never be used." When asked "why the school needed the Title IX exemption, if it never had intentions of discriminating," Dr. O'Brien replied: "I don't know. I guess some say in a complex world you just never know what a future world might be like, what kind of bizarre hypotheticals. So it's on file." Hailey Holloway, *Carson-Newman University Gets Title IX Exemption*, WATE 6 (Dec. 11, 2015, 4:56 PM), https://www.wate.com/news/local-news/carson-newman-university-gets-title-ix-exemption_20170818090212587/793087640. See also Lonnie Wilkey & Chris Turner, *Claiming Exemption Protects Colleges*, BAPTIST AND REFLECTOR (Dec. 15, 2015), <http://baptistandreflector.org/claiming-exemption-protects-colleges/>.

138. See *supra* notes 127 & 132.

139. Wilson, *supra* note 15, at 436.

140. Of course, state and local laws also operate to ban discrimination on the basis of illicit characteristics and so may limit or erase the school's ability to operate in a given jurisdiction. For discussion, see Wilson, *supra* note 15 (arguing that religious values should not operate as rules of exclusion of LGBT persons).

141. See Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017).

142. *Mission*, AAUP, <https://www.aaup.org/about/mission-1> (last visited Oct. 6, 2018).

ties across the country,¹⁴³ has taken on a central role in ensuring a free and open academic debate that searches for truth in the marketplace of ideas.¹⁴⁴ The AAUP endeavors to “shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom.”¹⁴⁵ The organization stands against “people who want to control what professors teach and write,” terming academic freedom a “fundamental principle” of the academy¹⁴⁶ and an “indispensable requisite for unfettered teaching and research in institutions of higher education.”¹⁴⁷

It is difficult to understate the AAUP’s influence. The AAUP issues guidelines and standards of academic freedom and calls out institutions that fail to meet them. “While the [AAUP’s statements] technically ha[ve] no legal force in [their] own right (though its extralegal authority is considerable), [they] ha[ve] been adopted by most accrediting agencies, whose determinations *do* have legal effect.”¹⁴⁸ For example, in 2012, the AAUP issued a joint statement on academic freedom with the Council for Higher Education Accreditation, an institution that “represents some 3,000 colleges and confers recognition on accrediting organizations.”¹⁴⁹ In that statement, the two bodies sketch the linkage between academic freedom and institutional accreditation:

Attention necessarily turns to accreditation, which plays a pivotal role in the public assurance of educational quality. To what extent are accrediting organizations alert to the importance of academic freedom? To what extent do their standards give adequate guidance on the subject and capture the significance of institutional decision making and the faculty’s role in that process? To what extent are these standards realized in application, by periodic inspection and, particularly, on occasions when major controversies erupt? Need more be done?¹⁵⁰

143. *About the AAUP*, AAUP, <https://www.aaup.org/about-aaup> (last visited Oct. 6, 2018).

144. “Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.” *Protecting Academic Freedom*, AAUP, <https://www.aaup.org/our-work/protecting-academic-freedom> (last visited Oct. 6, 2018).

145. *Mission*, *supra* note 142.

146. *History of the AAUP*, AAUP, <https://www.aaup.org/about/history-aaup> (last visited Oct. 6, 2018).

147. *Protecting Academic Freedom*, *supra* note 144.

148. McConnell, *supra* note 50; see also *The Database of Postsecondary Institutions and Programs*, OFF. OF POSTSECONDARY EDUC., <https://ope.ed.gov/dapip/> (last visited Oct. 6, 2018); Wilson, *supra* note 15, at 391 (“Private accrediting and certification bodies also exert significant influence because their approval is often the difference between economic viability and closure.”).

149. Peter Schmidt, *Accreditors Are Urged to Take New Steps to Protect Academic Freedom*, CHRON. OF HIGHER EDUC. (Nov. 20, 2012), <https://www.chronicle.com/article/Accreditors-Are-Urged-to-Take/135886>.

150. *Accreditation and Academic Freedom*, AAUP & CHEA (2012), <https://www.chea.org/userfiles/uploads/AAUP-CHEA%20-%20FINAL.pdf>.

The statement called on accreditors to “emphasize the principle of academic freedom in the context of accreditation review, stressing its fundamental meaning and essential value.”¹⁵¹

Government regulators often defer to accreditation bodies, deeming their determinations sufficient for key decisions over grants, federal student loan eligibility, and other governmental support of education.¹⁵² Scholarly societies like the American Historical Association also take seriously AAUP determinations, posting “open positions for history professors, [but] flag[ging] censured universities for job-seekers—‘a kind of “asterisk” next to the ad indicating that the institution is currently under censure.’”¹⁵³

And beyond the strictly legal consequences of the AAUP’s influence, AAUP censures of institutions weigh heavily on the censured institution’s legitimacy. Faculty at the recently censured University of Nebraska-Lincoln, for example, feel “certain the AAUP’s action will affect the university going forward.”¹⁵⁴ A religion professor from the University of Illinois called AAUP censure “a game-changer,” noting “[t]here is nothing more powerful in the arsenal of those on campus who want to defend academic freedom than AAUP censure.”¹⁵⁵

Over the years, the AAUP had been concerned about scholars being forced to mouth the opinions of religious colleges and universities that limit academic freedom while simultaneously flying under the false colors of a free academic university. Of central concern to the AAUP is the possibility that a professor will think she enjoys academic freedom only to be fired or disciplined when the professor’s scholarship breaks with the institution’s orthodoxy. Throughout the evolution of the AAUP’s statements on the place of academic freedom at religious universities and colleges are two distinct threads: (1) the need to avoid unfair surprises to faculty members by disclosing any limitations on academic freedom up front, ideally in the employee’s written contract with the religious university, disclosures short-handed as “limitation clauses,” and (2) that the enterprise that some relig-

151. *Id.*

152. The Department of Education “recognize[s] accreditation as the mechanism by which institutional and programmatic legitimacy are ensured.” *Accreditation and Quality Insurance*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-accreditation.html> (last visited Oct. 6, 2018). The Department of Education has identified several accreditation agencies whose approval “may be used by an institution accredited by the agency to establish eligibility to participate in Title IV programs.” *Accreditation in the United States*, U.S. DEP’T OF EDUC., https://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html#NationallyRecognized (last modified Sept. 14, 2018).

153. Chris Dunker, *AAUP Formally Censures UNL for Lecturer’s Dismissal*, LINCOLN J. STAR (June 16, 2018), https://journalstar.com/news/local/education/aaup-formally-censures-unl-for-lecturer-s-dismissal/article_cfb88f92-6eff-5476-a426-a3acb50e606a.html (quoting Stephen Ramsay, a professor of English at the University of Nebraska-Lincoln).

154. *Id.*

155. *Id.* (quoting Bruce Rosenstock).

ious institutions of higher education are engaged in is simply not what real, academically respectable universities are about.

Below, we track milestones in the evolution of the AAUP's statements on academic freedom at religious educational institutions and briefly summarize academic debate about the AAUP's positions. We do not intend to rehearse others' well fleshed-out positions. Instead, we sketch the competing views about the seriousness of religious universities' academic enterprise and highlight the centrality of notice to faculty. Missing largely from this account is notice to students as the primary consumer of the educations provided at religious universities, which we believe must be present, too.¹⁵⁶

A. AAUP Policy Statements

In 1915, the AAUP issued its *Declaration of Principles on Academic Freedom and Academic Tenure* ("1915 Statement"). Although not relied upon by the AAUP today, it labeled colleges and universities founded or maintained by religious groups "proprietary institutions, in the moral sense."¹⁵⁷ The 1915 Statement expressed no opinion on whether religious universities should exist but sounded concerns about notice—presumably to faculty and prospective and enrolled students:

[religious universities] do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance. Concerning the desirability of the existence of such institutions, the committee does not wish to express any opinion. But it is manifestly important that they should not be permitted to sail under false colors.¹⁵⁸

The 1915 Statement recognized there are many zones of inquiry that do not lend themselves to scientific inquiry, although academic freedom is valuable even as to these. "[P]hilosophy and religion" are one of three fields of human inquiry where academic research has barely scratched the surface, it said:¹⁵⁹ "[W]e are still far from a comprehension of the final truths, and from a universal agreement among all sincere and earnest men" as to matters of "the spirit life, and in the interpretation of the general meaning and

156. The public also has a stake in the rigor of the university's work and teaching, particularly if the university is an indirect recipient of federal and state student aid. Further, to the extent that a university is a grantee or contractor with government or private foundations, these contractual partners are impacted by the seriousness of the university's academic enterprise.

157. *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP, <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> (last visited Oct. 20, 2018).

158. *Id.*

159. *Id.* (naming natural science and social science as the other two).

ends of human existence and its relation to the universe.”¹⁶⁰ That said, as to all studies, “the breath in the nostrils of all scientific activity,” and “the first condition of progress,” the 1915 Statement observed, is “complete and unlimited freedom to pursue inquiry and publish its results.”¹⁶¹ In 1915, institutions desiring to maintain their religious character through faculty scholarship were “becoming ever more rare,” the AAUP observed.¹⁶²

In 1926, the AAUP adopted the *Conference Statement on Academic Freedom and Tenure* (“1926 Statement”), an attempt by a number of organizations to articulate a shorter statement of principles on academic freedom and tenure.¹⁶³ The 1926 Statement stressed notice to faculty members at such universities: “A university or college may not impose any limitation upon the teacher’s freedom in the exposition of his own subject in the classroom . . . except . . . in the case of institutions of a denominational or partisan character, specific stipulations in advance, fully understood and accepted by both parties, limit the scope and character of instruction.”¹⁶⁴

Years later, in 1940, the AAUP restated these principles in a Statement of Principles on Academic Freedom and Tenure (“1940 Statement”). On the issue of the academic freedom of individual professors within religious educational institutions, the statement reads: “Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.”¹⁶⁵ Some have interpreted this statement to require the explicit inclusion of a “limitations clause” in a professor’s contract.¹⁶⁶

Several AAUP committees commented on the limitations clause in the years following. One observed that “[a]t some point in the scale of self-imposed restrictions a college or university that comes under them may, of course, cease to be an institution of higher education according to the prevailing conception.”¹⁶⁷ Another observed that “[u]ndoubtedly under the terms of the 1940 Statement of Principles some degree of limitation of academic freedom ‘because of religious or other aims of the institution’ is ad-

160. *Id.*

161. *Id.*

162. *Id.* The 1915 Statement continues: “We still have, indeed, colleges under denominational auspices; but very few of them impose upon their trustees responsibility for the spread of specific doctrines. They are more and more coming to occupy, with respect to the freedom enjoyed by the members of their teaching bodies, the position of untrammelled institutions of learning, and are differentiated only by the natural influence of their respective historic antecedents and traditions.” *Id.*

163. *Academic Freedom and Tenure*, 32 BULL. AM. ASS’N U. PROFESSORS 149 (1946), <https://www.jstor.org/stable/40220666>.

164. *Id.* at 150.

165. *Id.* at 152.

166. McConnell, *supra* note 50, at 306–07.

167. W.J. Kilgore, *Report of the Special Committee on Academic Freedom in Church-Related Colleges and Universities*, 53 AAUP BULL. 369, 369 (1967) (quoting Committee A).

missible.”¹⁶⁸ A different committee, after a study of nearly two hundred religious colleges and universities, concluded that “[a]ny limitation on academic freedom should be essential to the religious aims of the institution” and that the faculty should be provided clear notice of any restrictions.¹⁶⁹

In 1970, the AAUP put an interpretive gloss on the 1940 Statement, adding footnotes that were adopted as AAUP policy (“1970 Statement”). Footnoted to the 1940 Statement’s discussion of “limitations” is this text: “Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 ‘Statement,’ and we do not endorse such a departure.”¹⁷⁰ Five years after this addition, the AAUP committee with oversight over the limitations clause described the clause as an “anachronistic indulgence.”¹⁷¹

By 1988, the AAUP tasked a subcommittee to make sense of how the 1940 and 1970 Statements fit together. The subcommittee ultimately concluded that the 1970 Statement did not undo the 1940 limitations provision, but that religious institutions must clearly and explicitly lay out the terms of any limitation of academic freedom to their faculty, as permitted under the 1940 Statement.¹⁷² Not doing so, but continuing to censor scholarship, would be to take advantage of an overly broad “indulgent limitation” unendorsed by the AAUP, signaling an unauthentic institution of higher learning.¹⁷³ Moreover, availing itself of limitations clauses says something about the university’s seriousness, the subcommittee noted: limitations clauses

168. *Advisory Letters from the Washington Office*, 51 AAUP BULL. 71, 72 (1965).

169. Kilgore, *supra* note 167.

170. See Graham, *supra* note 9 (noting that many find the desire of religious institutions to inscribe a faith-driven ethos on the institution to be a source of “bafflement and mockery”). For some, the fact that a dwindling number of institutions would use a limitations clause “argues for, not against, their accommodation. When the vast majority of academic institutions are committed to the view of knowledge reflected in the principle of secular academic freedom, there is little to be gained and much to be lost from quelling the few dissenting institutional voices. As religious institutions, such schools are more valuable as exemplars of an alternative understanding of knowledge than they could ever be as (in many cases, unexceptional) secular colleges.” McConnell, *supra* note 50, at 303.

171. *Report of Committee A, 1974–75*, 61 AAUP BULL. 104, 105 (1975).

172. Finkin et al., *supra* note 19, at 54–55.

173. *Id.* Under this view, absent an express limitation of academic freedom in the faculty member’s contract, there is a presumption of unfettered academic freedom, even at religious universities. Professors Douglas Laycock and Susan E. Waelbroeck would reverse this presumption, in part because of the connection between academic freedom and government regulation of religious universities:

Of course the Church could enter into an enforceable contract waiving its right to control its theologians. But it is unlikely to do so, and our general reluctance to find an implied waiver of constitutional rights requires that any such agreements be explicit and deliberate. Any government attempt to impose academic freedom on a religious university without its knowing and authorized consent would directly clash with the first amendment.

Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1455–56 (1988) (discussing the impropriety of government imposition of academic freedom).

signal that the institution is not authentically a part of the higher education community.¹⁷⁴ Some remarked at the time that this stance placed religious universities in an untenable position: comply with the 1940 Statement by expressly limiting the academic freedom of the university's faculty and be derided by the AAUP as not serious *or* ignore the 1940 Statement, give no notice of such limitations of academic freedom, and face formal AAUP censure.¹⁷⁵

Both scenarios foreground concerns about flying under false colors. In the first, the faculty has notice but the public does not; in the second, neither has notice, except what attention AAUP censure is likely to garner (which may be considerable in the immediate aftermath of censure).

Ultimately, the subcommittee's interpretation was not adopted by the governing committee of the AAUP:

The committee declined to accept the subcommittee's invitation to hold that the invocation of the clause exempts an institution from the universe of higher education, in part due to the belief that it is not appropriate for the Association to decide what is and what is not an authentic institution in higher education. The committee did conclude, however, that invocation of the clause does not relieve an institution of its obligation to afford academic freedom as called for in the 1940 Statement.¹⁷⁶

Presumably, the AAUP thought this statement would put the issue to rest. But the next year, the AAUP stated that a majority of the governing committee considered "the last sentence to be no more than a truism that begs the question of what obligation a church-related institution has to afford academic freedom. That question will apparently continue to vex us."¹⁷⁷

In 1997, perhaps to clear up lingering confusion, the subcommittee again convened to provide guidelines for how, procedurally, the AAUP should respond after receiving a complaint about infringements on academic freedom at a religious college or university. Its report recommended the AAUP (1) determine whether the institution is one whose adherence to the 1940 Statement is expected, (2) if expected, an investigation should commence to determine whether the religious limitation on academic freedom was explicit and accepted by the faculty member and/or whether the

174. Finkin et al., *supra* note 19, at 58.

175. *Id.* at 58–59 (comment of William W. Van Alstyne). Professor Laycock also worries that this stance places religious institutions between a rock and a hard place, labelling them as inauthentic members of the academic community *regardless* of their compliance with the 1940 Statement's limitations; this in turn "would create a powerful disincentive to disclosure." DOUGLAS LAYCOCK, RELIGIOUS LIBERTY, VOLUME 2: THE FREE EXERCISE CLAUSE 519–24 (2011). Further, "[t]his interpretation would convert an accommodation for religious schools into a hidden trap designed to drum such schools out of the academic community." *Id.*

176. Matthew W. Finkin, *Report of Committee A 1988–89*, 75 *ACADEME* 49, 54 (1989).

177. *Id.*

actions of the faculty member fall outside the purview of that limitation, and (3) deliver the investigation to an AAUP committee which would decide whether to censure the institution.¹⁷⁸ This recommendation would seem to reaffirm the ability of religious institutions to avail themselves of limitation clauses without fear of AAUP censure. The following year the AAUP again observed: “The meaning and scope of [the limitations] clause have been a perennial challenge.”¹⁷⁹

Since 1972, the AAUP has formulated *Recommended Institutional Regulations on Academic Freedom and Tenure*. These proposed regulations for universities “are designed to enable [a university] to protect academic freedom and tenure and to ensure academic due process.”¹⁸⁰ The most recent iteration of these proposed regulations, set forth in 2018 (“2018 Statement”), draws upon the AAUP’s 1940 Statement, its 1958 “Statement on Procedural Standards in Faculty Dismissal Proceedings,” the AAUP’s “continuing experience in evaluating regulations actually in force at particular institutions,” and “the standards and procedures of the [AAUP] over the years.”¹⁸¹ The 2018 Statement recommends universities adopt the following provision concerning academic freedom: “All members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure . . .*”¹⁸² The 2018 Statement says nothing explicitly about academic freedom limitations by religious institutions.¹⁸³ Taken at face value, one might assume the 2018 Statement incorporates by reference the limitations clause device referenced in the 1940 Statement. But the fact that the 2018 Statement does not specifically address the “perennial challenge” of the limitations clause would seem to be a harbinger of change—that institutions limiting academic freedom of their faculty would be subject to censure even when such limitations are disclosed in writing at the time of appointment. In the end, it is hard to predict just what the AAUP’s operating principle is against the backdrop of the AAUP’s debate about the limitation clause and the multiple layers of resulting policy statements.

178. Matthew W. Finkin et al., *The “Limitations” Clause in the 1940 Statement of Principles: Some Operating Guidelines*, 83 *ACADEME* 49 (1997).

179. Robert M. O’Neil, *Report of Committee A*, 83 *ACADEME* 75, 78 (1997), <http://www.jstor.org/stable/40251591>. Critics are less kind. Professor Laycock believes the AAUP has made a “great muddle . . . of its academic freedom rules. . . . [T]he AAUP rules are a mess.” Douglas Laycock, *Academic Freedom, Religious Commitment, and Religious Integrity*, 78 *MARQ. L. REV.* 297, 302 (1995).

180. *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP, <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure> (last visited Nov. 26, 2018).

181. *Id.*; *accord Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP, <https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings> (last visited Nov. 26, 2018).

182. *Recommended Institutional Regulations on Academic Freedom and Tenure*, *supra* note 180.

183. *See id.*

B. Religious Freedom of Religious Universities: Threat or Strength?

The single through line in the AAUP's treatment of academic freedom has been notice to faculty. At a minimum, notice to faculty serves the goods of avoiding harm to a faculty member who wants to pursue serious scholarship and may be holding multiple offers, both at institutions that will provide the necessary space for that work *and* at institutions that will not.

How one feels about the larger good of religious institutions following religious norms in educating students, rather than secular ones, may rest on the value one places on religious institutions generally or religious freedom itself. Scholars, like Professor Jessie Hill, note that "religious institutions play a unique and valuable role in society. They serve as counterpoints to the state, offering competing norms and values, and as such, they play an important role in supporting a pluralistic and robust civil society."¹⁸⁴ Professor McConnell echoes: "Even if the accommodation of religious approaches to knowledge were not valuable to the advancement of knowledge itself, a modification of academic freedom principles would nonetheless be justified because of its importance to religious freedom."¹⁸⁵ Those in the community of religious educators urge that religious commitments should receive equal respect with secular ones—"just as society leaves room for secular commitments in the pursuit of knowledge and preparation of the next generation to lead full, impactful lives, it must leave room for religious ones, as well."¹⁸⁶

Professor Matthew Finkin, who served on the AAUP subcommittee discussed above, stresses the potential abuses by religious institutions flying under false colors, much as the AAUP did in its 1915 Statement.¹⁸⁷

An [religious] institution so dedicated, as an agency of dogma and doctrine, may test the limit of societal tolerance, but the freedom to be an unfree place, to be a place where no utterance contrary to some officially established truth may be heard on the institution's property—even on its public paths and parking lots—cannot be invoked under the head of "academic freedom" without working a debasement of meaning.¹⁸⁸

Professor Finkin's challenge goes beyond the classic point of whether toleration can make room for intolerance to probe whether such institutions, as unfree places, properly may be called universities. Like Professor Finkin, we worry that students standing on the cusps of their futures may not fully

184. B. Jesse Hill, *God and Man and Religious Exemptions in the Modern University*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* (Bill Eskridge, Jr & Robin Fretwell Wilson eds., 2018).

185. McConnell, *supra* note 50, at 304.

186. Hoogstra, LoMaglio & Crofford, *supra* note 2.

187. *See supra* note 157.

188. Matthew W. Finkin, *On Institutional Academic Freedom*, 61 *TEX. L. REV.* 817, 839–40 (1983).

understand the consequences of attending a university that limits the academic freedom of its faculty. As the next subpart illustrates, the AAUP has censured religious universities both for environments anathema to free inquiry as to all matters, as well as universities that have policed faculty in their articulation of narrow theological claims at the core of the faith tradition of the university.

C. AAUP Censure

Clues as to the AAUP's current position towards the 1940 Statement's limitations clause can be found in the various investigations the AAUP conducts at religious colleges and universities it feels has violated its standards of academic freedom. When the AAUP investigates an institution, AAUP members speak with its leaders, the parties to the particular conflict, students, and faculty members, which may surface other complaints.¹⁸⁹ Many of these investigations result in a formal censure of the educational institution, accompanied by an in-depth, published report. Currently, fifty-six colleges and universities sit on the AAUP's censure list.¹⁹⁰ Of these, at least twenty, roughly 36 percent, have religious ties.¹⁹¹

A pair of cases resulting in censure highlight the risks of honoring, and not honoring, limitations on academic freedom. Consider one currently censored university, Southeastern Baptist Theological Seminary ("Southeastern") in Wake Forest, North Carolina. In 1989, the AAUP found that "academic freedom at Southeastern has been placed in peril."¹⁹² In its report, the AAUP concluded that a newly-installed board of trustees and president of Southeastern interfered with faculty appointments. The degree to which they interfered signaled that "doctrinal correctness, narrowly measured, is of far greater significance than openness of mind" at Southeastern.¹⁹³ To the extent that religiously-minded officials superintended content

189. *What is Censure?*, AAUP, <https://www.aaup.org/issues/academic-freedom/whatisensure> (last visited Sept. 29, 2018). Of course, not all universities cooperate with such investigations. For instance, Loma Linda University, when faced with an AAUP investigation, rebuffed the entire process. The university president chided the AAUP, stating that "The individuals who invited you here also obviously neglected to tell you that membership in a union like the AAUP violates the tenets of the Seventh-day Adventist Church which sponsors Loma Linda University and to which these individuals claim to belong. . . . Your organization is not welcome on university premises. University facilities are not open for the use of your committee." *Loma Linda University (California)*, 78 *ACADEME* 42, (1992), <https://www.aaup.org/file/Loma-Linda-University.pdf>. The AAUP proceeded to meet individuals at off-campus locations, and eventually reprimanded the university for the dismissal of three of its professors. *Id.*

190. *Censure List*, AAUP, <https://www.aaup.org/our-programs/academic-freedom/censure-list> (last visited Sept. 29, 2018).

191. *Id.* Religious colleges and universities in the U.S. are over-represented on the AAUP's censure list when compared to the fraction of all universities and colleges in the U.S. that have religious ties. See *supra* notes 1 & 2.

192. *Academic Freedom and Tenure: Southeastern Baptist Theological Seminary (North Carolina)*, 75 *ACADEME* 35, 44 (1989).

193. *Id.* at 44.

in courses running the gamut of the curriculum—or that the influence exerted on appointments seeped into how Southeastern faculty conducted their classes—students enrolling in Southeastern *may* be at risk for receiving educations that are deficient in basic preparation on subjects like math, science, and English. If this is so, basic fairness would demand that Southeastern’s students should be put on notice.

Contrast this with the 1997 kerfuffle which landed Brigham Young University (“BYU”), a wholly owned subsidiary of The Church of Jesus Christ of Latter-day Saints (the “Church”), on the AAUP’s censured list. The AAUP censured BYU for its treatment of a professor who “advocated praying to a Mother in Heaven” in class, in her scholarship, and at public events.¹⁹⁴ BYU claimed that praying to a Heavenly Mother, instead of a Heavenly Father, contradicted fundamental church doctrine.¹⁹⁵ In its Academic Freedom Policy, the university outlined limitations, which included:

when the faculty behavior or expression *seriously and adversely affects* the University mission or the Church. Examples would include expression with students or in public that: 1. contradicts or opposes, rather than analyzes or discusses, fundamental Church doctrine or policy; 2. deliberately attacks or derides the Church or its general leaders; or 3. violates the Honor Code because the expression is dishonest, illegal, unchaste, profane, or unduly disrespectful of others¹⁹⁶

After an investigation, the AAUP concluded that “infringements on academic freedom [at BYU] are distressingly common and that the climate for academic freedom is distressingly poor.”¹⁹⁷ In response to the censure report, BYU officials observed:

If a religious university cannot limit a professor from publicly endorsing prayer to a God other than the God to whom we are commanded to pray, then it cannot limit anything, and the “limitations” clause of the 1940 Statement is an outright deception. The “limitations” clause was designed to respect the mission and institutional academic freedom of religious colleges and universities. It is regrettable that the AAUP has elected not to follow the 1940 Statement, which honors that religious freedom.

Despite the university’s use of contractual provisions notifying faculty of the university’s limitations on academic freedom, BYU’s censure stuck.

If encroachments extended beyond the administration’s reprimand of the one faculty member on this one article of faith, this case would be more like the climate the AAUP charged prevailed at Southeastern. But let us posit that BYU limited the area in which it effectively overruled faculty

194. *Academic Freedom and Tenure: Brigham Young University*, 75 *ACADEME* 52 (1997).

195. *Id.* at 59.

196. *Id.* at 55.

197. *Id.* at 68.

members' views to matters of deep theological import—such as whether a Heavenly Mother exists in addition to a Heavenly Father or whether a follower of the Church should pray to a Heavenly Mother. In this instance, we would have far less grave concerns about notice to students who may choose to attend BYU since they surely believe that they are at BYU to, among other things, be versed in and absorb the Church's theology. One can hardly imagine a person at BYU not understanding that since:

New faculty are interviewed by Church General Authorities as a condition of employment, and Church members are subsequently expected, as part of their university citizenship, to “live lives of loyalty to the restored gospel.” Faculty of other faiths agree to respect the LDS nature of the University and its mission, while the University in turn respects their religious convictions.¹⁹⁸

Indeed, many BYU students, who are required to attend church meetings,¹⁹⁹ and their parents, consciously select BYU as their preparatory grounds *in order* to be versed in the faith, which they will carry into the world. This fact tees up the question: how should one think of academic freedom of faculty in relation to the university's mission of preparing students for lives in a specific faith tradition?

VI. NAVIGATING COLLISIONS BETWEEN INSTITUTIONAL RELIGIOUS LIBERTY AND INDIVIDUAL ACADEMIC FREEDOM

In the struggle between religious freedom of religious universities and honoring the academic freedom of individual faculty, the guardrails placed around university discretion by Title VII strikes us as sensible. Religious universities have dual missions: first, to shape students in their religious commitments, and second, to provide solid liberal arts and general educations. To achieve the first, religious universities *must* hold a veto power on theological claims made by individual faculty. But to achieve the second—providing a solid education—the religious university should no more quash, shape, or influence a faculty member's research on subjects or topics that are non-theological than any other university should do so.

We recognize that borrowing this approach from Title VII will mean, like Title VII itself, that one has to draw lines around what counts as a theological dispute and what does not. Under the heading of non-theological claims—for which the faculty member necessarily has academic freedom—we would place scientific claims and matters that are empirically falsifiable. On the side of theological disputes, we would place claims as to the nature of God and the existence of after-life as easy examples. Ques-

198. *Academic Freedom*, BRIGHAM YOUNG UNIV. 1, 3, <https://policy.byu.edu/view/index.php?p=9> (last visited Sept. 29, 2018).

199. *Church Educational System Honor Code*, BRIGHAM YOUNG UNIV. 1, 6, <https://policy.byu.edu/view/index.php?p=26> (last visited Sept. 29, 2018).

tions like intelligent design sit at the margin of the theological and non-theological but are not today amenable to falsification.²⁰⁰

What would this mean at a school like Southeastern? If Southeastern directed its faculty to teach students that the earth is flat (it is not, despite a not-insignificant fraction of Millennials holding this belief)²⁰¹—and a faculty member balked—we believe the faculty member should prevail. But if Southeastern directed faculty members to instruct students that God is a triune deity or that Jesus is the only way to salvation, we believe the faculty member would have to yield to the university’s view *in order for* the university to carry out its mission to prepare students in their faith tradition.

Of course, like the Title IX blanket waiver letters discussed above, universities may seek to cloak *every* dispute in a theological framework. For example, one can imagine a female professor studying whether women have similar leadership styles to men or whether women’s leadership styles allow them to excel at specific tasks like piloting choppers safely²⁰²—and a fundamentalist university countering that women should not be the head of the man.²⁰³ Under a framework that divides questions into theological and non-theological ones—and commits the theological to the university to decide and control—if the professor makes the claim in a theology class, she would not have the academic freedom to do so. But if the professor makes the claim in a physiology class, she would, since students are there to learn how specific biological structures affect the functioning of the human body,

200. See, e.g., Kent Greenawalt, *Intelligent Design: Scientific Theory or Religious Conviction?*, 45 J. CHURCH & ST. 237 (2003) (“unpack[ing] the claims of intelligent design, analyzing to what extent they may belong in science courses, and the degree to which they represent religious assertion”). A continuum exists between being non-falsifiable and falsifiable; as knowledge on a subject accretes or new methods of inquiry give us a glimpse of the universe we previously did not have, a claim may become falsifiable. Thus, things now seen as scientifically certain were theological questions in the past. Consider the Ptolemaic view of the universe—that the sun revolves around the Earth. *The Ptolemaic Model*, IOWA STATE UNIV., http://www.polaris.iastate.edu/EveningStar/Unit2/unit2_sub1.htm (last visited Oct. 6, 2018); Alexander Raymond Jones, *Ptolemaic System*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/science/Ptolemaic-system> (last visited Oct. 6, 2018). For hundreds of years, the Catholic Church followed this belief. Today, we would call that a falsifiable view. But 385 years ago, holding the view that the Earth revolved around the sun put Galileo, a teacher at the University of Padua, at odds with the Catholic Church. The Church detained Galileo on house arrest for nine years until he died. And even after Galileo’s death, the Church persecuted those who advanced Galileo’s theory, a theory that now has been accepted as a scientific fact for 250 years. Only in 1992 did the Catholic Church acknowledge the validity of Galileo’s work. Alan Cowell, *After 350 Years, Vatican Says Galileo Was Right: It Moves*, N.Y. TIMES (Oct. 31, 1992), <https://www.nytimes.com/1992/10/31/world/after-350-years-vatican-says-galileo-was-right-it-moves.html>.

201. Two-thirds of Millennials in a recent survey indicated the earth is round. The remainder were skeptical, unsure, or believe it is flat. Trevor Nance, *Only Two-Thirds of American Millennials Believe the Earth Is Round*, FORBES (Apr. 4, 2018), <https://www.forbes.com/sites/trevornance/2018/04/04/only-two-thirds-of-american-millennials-believe-the-earth-is-round/#7220bc617ec6>.

202. Mark Thompson, *Army Women: Better Chopper Pilots Than the Guys?*, TIME (Feb. 17, 2014), <http://time.com/8404/army-women-helicopter-pilots/>.

203. 1 *Timothy* 2:12; 1 *Corinthians* 11:3.

not what the Apostle Paul said about the relationship between Christ and men, or between men and women.

Parsing in this way brings considerably more of the work of individual faculty at religious universities under the umbrella of academic freedom than does a limitations clause approach. Under the limitations clause approach, religious universities are incentivized to insert broad contractual provisions in their contracts with faculty members, permitting the university to superintend everything being taught. These contracts act as adhesion contracts since faculty seeking coveted teaching positions lack equal bargaining strength. Broad limitations clauses presumably satisfied the 1940 Statement, although the actual censure decision described in BYU's case may call this into question.

Consider a second hard case, adapted from *Hall v. Baptist Mem'l Health Care Corp.*²⁰⁴ In *Hall*, an employee claimed she had been fired by the Baptist nursing college where she worked after she told the college she ministered at a church that welcomed gay and lesbian people like herself.²⁰⁵ She alleged only religious discrimination.²⁰⁶ The college defended on the doctrinal ground that homosexuality was a “perversion of divine standards.”²⁰⁷ The U.S. Court of Appeals for the Sixth Circuit found the college qualified as a religious institution under Section 702(a), entitling it to summary judgment.²⁰⁸

Imagine that Hall taught at Southeastern and further imagine two scenarios: first that Hall teaches students that some persons have sexual desires for persons of the same sex and second that Hall instructs her students that God makes no mistakes so that LGBT persons could not be a “perversion of divine standards.”²⁰⁹ Under a framework dividing theological claims and non-theological ones, Hall would prevail in a clash over the first teaching, on academic freedom grounds, because the claim she made—that some persons have sexual desires for persons of the same sex—is a factually falsifiable claim. Plainly, whether the AAUP or other forces external to the university believe that she should have academic freedom may not in fact insulate the faculty member from repercussions, but any firing or discipline of the faculty member for this teaching would subject the school to censure. On the second teaching, however, the faculty member makes a theological claim; for this, she would not enjoy academic freedom under this approach.

204. 215 F.3d 618 (6th Cir. 2000).

205. *Id.* at 622–23.

206. *Id.* at 621.

207. *Id.* at 622.

208. *Id.* at 624.

209. See Jennifer C. Pizer, *It's Not About the Cake: Against "Altaring" the Public Marketplace*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018).

As before, note that the limitations clause approach would place both clashes over what the faculty member can teach without fear on the same plane, leaving her subject to sanction by the university for both claims if the university so limited its employment contracts—while giving students no notice of that fact.

In all of these line-drawing cases, pretext may operate, just as it does with Title VII, where discrimination on a protected ground other than religion may actually motivate a dismissal or sanction of the faculty member, not the theological claim being made. It is important not to conflate the two. Under the framework we propose, factual questions will arise and fact-finders will have to divine the real motivation for an adverse employment decision. Consider as an example AAUP's censure of Albertus Magnus College,²¹⁰ a Roman Catholic college, which dismissed a gay professor for his views on abstinence. In the preface to one of his books, the professor expressed concerns about "the manner in which the moral ideal of sexual abstinence outside of marriage is used [to] deprive individuals of resources essential to their personal and spiritual well-being" and that he was convinced "that the continuance of traditional Christian sexual moral rules . . . is causing significant harm."²¹¹ The school fired him and the professor sued for sex discrimination; he won—the professor's sexual orientation as a gay man figured in the college's decision-making.²¹²

Importantly, one's view of academic freedom's value at religious universities may be impacted by one's archetypal view of academic freedom. For many people, the mental map of academic freedom assumes a regressive institution firing an enlightened individual faculty member, who but for the firing would open vistas for students trapped at the regressive institution. This regressive-institution-enlightened-faculty-member-configuration is not always the fact pattern presented.

Imagine that the faculty member claiming academic freedom is the conservative force, circulating views that do not fit the progressive tenor of the university environment. Something like this occurred at University of Toledo, where a human resources director, who was not entitled to academic freedom, wrote an op-ed in the local paper in response to the Editor-in-Chief's previous op-ed on gay rights, saying:

As a Black woman . . . I take great umbrage at the notion that those choosing the homosexual lifestyle are "civil rights victims." Here's why. I cannot wake up tomorrow and not be a Black wo-

210. *Academic Freedom and Tenure: Albertus Magnus College (Connecticut)*, 86 *ACADEME* 54 (2000).

211. MICHAEL J. HARTWIG, *THE POETICS OF INTIMACY AND THE PROBLEM OF SEXUAL ABSTINENCE* 4 (2000).

212. *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000).

man. I am genetically and biologically a Black woman and very pleased to be so as my Creator intended.²¹³

The university president put the director on administrative leave three days after the statement.²¹⁴ He, too, then authored an op-ed in the paper, distancing himself from the director's statement; he made clear the director's position did not "accord with the values of the University of Toledo."²¹⁵ Now, as director of human resources, this employee was tasked with enforcing EEOC guidelines, state laws, and university policies about hiring fairly, including not discriminating based on sexual orientation. The human resources director sued the university, alleging she had been retaliated against for the exercise of her free speech rights under the First Amendment and was not guaranteed equal protection under the Fourteenth Amendment like her colleagues because she expressed a less favored viewpoint grounded in her Christian faith.²¹⁶ Neither claim succeeded.²¹⁷

However, if this same statement had been made by a faculty member who held no administrative position, it makes a theological claim about what God intends and does not intend in terms of human sexuality. As a theological claim, it would merit no academic freedom if made at a religious university that took a contrary view under the approach we have been describing.

In many ways, the line we draw here is no different than when secular institutions self-define by commitments to inclusion. So, for example, Oberlin College took action against one of its professors for anti-Semitic and anti-Israel statements made outside the university on the professor's personal Facebook page.²¹⁸ One of the professor's posts attacked Israel as a Zionists state.²¹⁹ Another stated:

It's troubling that in this day and age, where there is all this access to information, most of the general public doesn't know who and what ISIS really is. I promise you, ISIS is not a jihadist, Islamic terrorist organization. It's a CIA and Mossad operation, and there's too much information out there for the general public not to know this.²²⁰

213. *Dixon v. Univ. of Toledo*, 702 F.3d 269, 271–72 (6th Cir. 2012).

214. *Id.* at 272.

215. *Id.*

216. *Id.* at 274, 277–78.

217. *Id.* at 277, 279.

218. Colleen Flaherty, *Oberlin Ousts Professor*, INSIDE HIGHER EDUC. (Nov. 16, 2016), <https://www.insidehighered.com/news/2016/11/16/oberlin-fires-joy-karega-following-investigation-her-anti-semitic-statements-social>; see also Colleen Flaherty, *Unacademic Freedom?*, INSIDE HIGHER EDUC. (Mar. 2, 2016), <https://www.insidehighered.com/news/2016/03/01/does-academic-freedom-protect-falsehoods>.

219. David Gerstman, *Oberlin Professor Claims Israel Was Behind 9/11, ISIS, Charlie Hebdo Attack*, THE TOWER (Feb. 25, 2016), <http://www.thetower.org/3012-oberlin-professor-claims-israel-was-behind-911-isis-charlie-hebdo-attack/>.

220. *Id.*

Altogether, the mass of the professor's statements were too much for the college to take and they terminated her employment.²²¹ In today's technological age, the distinction between in-the-classroom and out-of-classroom conduct has arguably evaporated; still, we acknowledge that communications outside the classroom may merit greater insulation from the university's reach.²²² But a Facebook post or tweet is likely more accessible to students and ultimately more divisive in the community at large than anything said in a classroom. For Oberlin College, the faculty member's academic freedom was beside the point. The college argued that her statements were not protected because they were not "part of her scholarship and 'had irreparably impaired [her] ability to perform her duties as a scholar, a teacher and a member of the community.'"²²³ Further, academic freedom does not insulate views that have no basis in fact or are identifiably false.²²⁴ But like religious colleges themselves, Oberlin's specific commitments as an institution made it impossible to have in its midst dissent on so fundamental a point—here, arguably the notion that distinctions should not be made on the basis of religion or that an identifiable group of people should not be maligned.²²⁵

221. Flaherty, *Oberlin Ousts Professor*, *supra* note 218.

222. See Mara Rose Williams, *Free to Speak Freely; Colleges Protecting Faculty Speech On Campus and Off*, KAN. CITY STAR (June 15, 2018), <https://www.kansascity.com/news/local/article212807554.html>.

223. Flaherty, *Oberlin Ousts Professor*, *supra* note 218.

224. Flaherty, *Unacademic Freedom?*, *supra* note 218 ("Karega makes declarations that most educated people, let alone people with doctorates and regardless of their positions on Israel, would reject as unsupported by fact.").

225. More recently, academic heavy-hitters and their universities have come under fire for academic views on politically and socially touchy issues like LGBT rights. At Johns Hopkins University, an emeritus faculty member, who has been called "the most important American psychiatrist of the last half-century," published a 143-page article together with a visiting statistician in *The New Atlantis* that argued there is no provable scientific basis for being transgender and that being gay is a choice. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, 50 *NEW ATLANTIS* 1, 4 (Adam Keiper ed., 2016) (citing the *Editor's Note*). Critics quickly gathered to deride his argument as junk science. Brynn Tannehill, *Debunking the New Atlantis Article on Sexuality and Gender*, HUFFPOST (Mar. 24, 2017), https://www.huffingtonpost.com/entry/debunking-the-new-atlantis-article_us_58d5242ee4b0f633072b36a4; *Press Releases: McHugh Exposed: HRC launches Website Debunking the Junk Science of Paul McHugh*, HUMAN RIGHTS CAMPAIGN (Apr. 21, 2017), <https://www.hrc.org/press/mchugh-exposed-hrc-launches-website-debunking-the-junk-science-of-paul-mchugh>; Peter LaBarbera, *LGBT Activists Slam 'the Most Important Psychiatrist of the Last Half-Century' Because He Debunks Transgender Ideology*, LIFESITE (May 15, 2017), <https://www.lifesitenews.com/news/lgbt-activists-slam-the-most-important-psychiatrist-of-the-last-half-centur>. Whatever the merits of the professor's briefing of the scientific literature, the professors' paper acted as a lightning rod, drawing criticism from LGBT activist groups such as the Human Rights Campaign, which urged John Hopkins to disavow the work. Johns Hopkins refused to do so and in response, the Human Rights Campaign downgraded the university on its 2017 Healthcare Equality Index. *Why Johns Hopkins Hospital Received the 25 Point Deduction in the HEI*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/johns-hopkins> (last visited Oct. 6, 2018); *Healthcare Equality Index 2017*, HUMAN RIGHTS CAMPAIGN (2017), https://assets2.hrc.org/files/assets/resources/HEI-2017.pdf?_ga=2.180874855.1584542250.1531411435-833632595.1530561798&_gac=1.140832006.1531412041.EAIAIQobChMIIdqXs_qZ3AIVh1x-Ch1TIguqEAA

Consider the degree of offense that would be given, if a faculty member, writing in their areas of scholarship inside religious school, could make claims that go to the very core of the community's identity. Imagine that David Irving, an author who denies the Holocaust,²²⁶ obtained tenure at Yeshiva University, "the world's premier Jewish institution for higher education."²²⁷ Many professors wait to wade into the more controversial elements of their disciplines until they have achieved the professional security of tenure, so imagine further that Irving's views on the Holocaust do not surface until he achieves tenure. Under our approach, if Irving asserted that the Jewish people are not God's chosen people, he could be fired without infringing on academic freedom commitments because that would be a theological statement. But if Irving asserted that the Holocaust never happened, this would be a falsifiable claim for which he could make a colorable claim as to academic freedom—although one might sustain dismissal on grounds that the view is not professionally competent, a view AAUP officials have articulated, as we explain below. Now, if the claim is so outlandish that it has no basis in fact, Yeshiva may follow Oberlin's example and dismiss the faculty member nonetheless.

Our point here is modest: this is one cost of academic freedom that is overlooked. It seems wrong to penalize Yeshiva University for refusing to keep a Holocaust denier in their midst. In Catholic terms, Irving's viewpoint would be causing scandal. In ecumenical terms, he disrespects Jewish persons by denying something so central to their history and experience of the world—especially when the Holocaust is confirmed by first-hand ac-

YASAAEgKsnfD_BwE. Separately, three Johns Hopkins faculty members published an op-ed disavowing the professor's essay. It said they "vigorously support the right to academic freedom and scientific disagreement and debate. Indeed, debates are the very basis of the scientific method. That same commitment to scientific debate means we must engage the dialogue in a circumstance such as this, and not stand silently by." Chris Beyrer, Robert W. Blum, & Tonia C. Poteat, *Hopkins Faculty Disavow 'troubling' Report on Gender and Sexuality*, THE BALTIMORE SUN (Sept. 26, 2016), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-lgbtq-hopkins-20160928-story.html>.

One of us has stated elsewhere that whatever the limits of our scientific understanding of the nature of cross-gender identification, members of the transgender community have an extremely high risk of suicide and depression. That point should be the central consideration, sparking compassion and protections for a community at risk. Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 8 UNIV. CAL. IRVINE L. REV. 101 (2018); see Tari Hanneman, *Johns Hopkins Community Calls for Disavowal of Misleading Anti-LGBTQ "Report,"* HUMAN RIGHTS CAMPAIGN (Oct. 6, 2016), <https://www.hrc.org/blog/johns-hopkins-community-calls-for-disavowal-of-misleading-anti-lgbtq-report>; *Petition to Hopkins to Address False LGBT Reports*, https://assets2.hrc.org/files/documents/Petition_to_Hopkins_9.29.16.pdf?_ga=2.208595986.1200774244.1536682879-833632595.1530561798 (last visited Oct. 6, 2018); *McHugh Exposed*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/mchughexposed?_ga=2.19752056.1584542250.1531411435-833632595.1530561798 (last visited Oct. 6, 2018).

226. Carole Cadwalladr, *Antisemite, Holocaust Denier . . . Yet David Irving Claims Fresh Support*, THE GUARDIAN (Jan. 14, 2017), <https://www.theguardian.com/uk-news/2017/jan/15/david-irving-youtube-inspiring-holocaust-deniers>.

227. *About*, YESHIVA UNIVERSITY, <https://www.yu.edu/index.php/about> (last visited Oct. 20, 2018).

counts of persons alive today.²²⁸ It is difficult to conclude Irving should stay employed by a university when everything he espouses is anathema to the institution, the community it has built, and its members.

This hypothetical is not far-fetched. In fact, both Lincoln University and Northwestern University have Holocaust-deniers on their tenured faculty.²²⁹ At Northwestern, Arthur Butz teaches engineering—a field where research on the Holocaust is not central.²³⁰ But at Lincoln, Kaukab Siddique teaches literature and mass communications, a field that might broach the Holocaust as a relevant topic.²³¹

Taking Siddique's Holocaust denial up as a case study, former AAUP President Cary Nelson²³² acknowledges that Siddique is walking a fine line between academic freedom and professional fitness by contending that the Holocaust did not occur, a falsifiable contention.²³³ For Nelson, it is relevant whether the faculty member's contention occurs in a class where the subject is germane, whether the speech institutionalizes ignorance and hatred, whether the speech promotes "falsity as truth," and if the speech decreases students' respect for the faculty member, although "historical accuracy is the determining issue."²³⁴ Detractors fear that Holocaust deniers would not be marked clearly out of bounds under such a context-specific inquiry.²³⁵ Nelson recognizes the limitations of the principle of academic freedom, noting it "does not protect [against] all of the actions that can flow from Holocaust denial."²³⁶ For Nelson, having Siddique tell students, in a class on literary fiction, that the Holocaust never happened crosses the line and amounts to hate speech, no matter Siddique's intent in making his point.²³⁷ For Nelson, the decisional tool for shedding faculty members who betray the pursuit of truth to this degree should be the principle of professional competency, not academic freedom; a finding of incom-

228. James McAuley, *An 89-Year-Old Holocaust Survivor Worries: What Happens When We're All Gone?*, WASH. POST (Jan. 26, 2018), https://www.washingtonpost.com/world/europe/an-89-year-old-holocaust-survivor-worries-what-happens-when-were-all-gone/2018/01/26/860462dc-ff98-11e7-86b9-8908743c79dd_story.html?utm_term=.9ff6aa678e2c.

229. Cary Nelson, *It Depends on the Context, in Does Academic Freedom Protect Holocaust Deniers?*, CHRON. OF HIGHER EDUC. (Nov. 14, 2010), <https://www.chronicle.com/article/Does-Academic-Freedom-Protect/125295>. "[T]he way tenure has evolved, it is virtually impossible to get rid of faculty members who have it, even if they are, amazingly, Holocaust deniers." *Id.*

230. *Id.*

231. *Id.*

232. *Presidents of the Association*, AAUP, <https://www.aaup.org/about/history/presidents-association> (last visited Oct. 20, 2018).

233. Nelson, *supra* note 229.

234. *Id.*

235. Some charge that the AAUP has rushed "to the defense of professors who don't believe six million Jews were murdered by the Nazis," revealing a "bizarre [] understanding of academic freedom." Naomi Schaefer Riley, *Apparently, If You're in the Right Discipline, in Does Academic Freedom Protect Holocaust Denier?*, CHRON. OF HIGHER EDUC. (Nov. 14, 2010), <https://www.chronicle.com/article/Does-Academic-Freedom-Protect/125295>.

236. Nelson, *supra* note 229.

237. *Id.*

petence can resolve the matter. Thus, Siddique's employer should ask whether he has the "capacity to weigh evidence, to undertake rational analysis, to perform academic responsibilities reliably," and "recognize fundamental and well-established knowledge."²³⁸

One can think of the line we draw here between theological claims and non-theological ones as a kind of competency in the context of religious universities that seek to perpetuate a specific view of their faith. Theological commitments are core to the university's enterprise, for which they can demand competency by their faculty—defined as singing from the same sheet of theological music. Most of the grounds religious institutions advance to justify religious discrimination in hiring cannot be fact-checked and would act as theological commitments for which there would be no academic freedom for faculty under this proposal: Is there a God? When does life begin? Was Christ resurrected? Are we all people of the Book? Respect for institutional religious freedom includes an understanding that faith-based knowledge need not be grounded empirically.²³⁹

Like the AAUP, we believe it is essential to avoid unfair surprise to faculty that theological commitments will remain the province of the religious university at which they teach. But unlike the AAUP, we believe there is a considerably thicker role for notice to students who, without notice, may make investments in an education that ill-serves their needs to be prepared for careers in science, literature, engineering, or whatever discipline they elect to study.

VII. NOTICE TO THE WORLD, NOT JUST FACULTY

Religious institutions must make explicit the limitations they place upon academic scholarship, not only to faculty but to students. These should outline the theological truths the university holds central and how professors are expected to promote those truths. Schools should clearly announce the boundaries of the theological commitments in acceptable scholarship. And these limitations should be transparent—publicly available to the general university or college community and prospective students, not

238. *Id.*; see also Cary Nelson, *Cary Nelson Replies, in Does Academic Freedom Protect Holocaust Deniers?*, CHRON. OF HIGHER EDUC. (Nov. 14, 2010), <https://www.chronicle.com/article/Does-Academic-Freedom-Protect/125295> ("The issue in a hearing would be professional fitness, which is a matter to be determined by a faculty review or hearing committee. That involves academic judgments about professional competence and professional boundaries. The American Association of University Professors distinguishes between speech that can be held to standards of professional competence and speech that has no bearing on professional competence.") (" . . . [I]t is only [Siddique's] professional fitness that is at issue in reviewing his academic status.").

239. See McConnell, *supra* note 50, at 304 ("If religious ideas and approaches have anything positive to contribute to the sum of human knowledge, we should recognize that secular methodology cannot be universalized. To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity—and decrease the vitality—of American intellectual life.").

contained only in the employment agreement between the university and faculty members. Doing so would give full force to the notice principle motivating the 1940 Statement's limitation.

But to realize the full benefits of this notice principle, one must go further than the 1940 Statement's focus on notice to faculty and look to the public consumers of the universities: the students. Just as with faculty, the question of whether students grasp the parameters of permissible academic research at a given religious university is unclear. Statements of faith that delineate these parameters for students, perhaps in admissions or online materials,²⁴⁰ would aid interested students in their own decisions to attend the university and fend off academic surprises at the student level, too.²⁴¹ Although the AAUP's first priority is to faculty members, as an advocacy organization and as a union, increased notice to students would also advance AAUP's more general mission of maintaining "quality in education and academic freedom in this country's colleges and universities."²⁴²

Some may say that a student notice rule is duplicative of the "implied consent" students give when they apply for admission to a school which is so obviously connected to religious worship.²⁴³ For example, it is hard to believe that students applying to Wheaton College make it through the application process without realizing that the Wheaton experience will be saturated with evangelical Christianity. Indeed, Wheaton's homepage on its website openly proclaims its Christian identity: Wheaton is a "top distinctively Christian liberal arts college" and "top-tier education that will prepare you to make an impact in the word for Christ and his Kingdom."²⁴⁴

240. For example, Southeastern Baptist Theological Seminary requires its applicants to sign "The Southeastern Covenant," certifying the applicant "understand[s] and embrace[s] the commitment of Southeastern to be a distinctively Christian institution, and I commit myself to seek to know and obey Christ and His Word," and that the student pledges to follow a Biblically-inspired code of conduct. *The Southeastern Covenant*, SOUTHEASTERN BAPTIST THEOLOGICAL SEMINARY, <https://www.sebts.edu/files/Southeastern%20Covenant.pdf> (last visited Oct. 20, 2018).

241. See Stephen L. Carter, *The Constitutional and the Religious University*, 47 DEPAUL L. REV. 479, 484–85 (1998) ("[P]erhaps [religious schools] should, in effect, be required to give fair notice of what religious rules they plan to enforce—but no school is likely to list everything, and no student is likely to be aware in advance what issues might strike him or her as important after a year or two of higher education."). See also Berg, *supra* note 56, at 1343, 1369–71 ("The clients and employees affected by [religious] organizations should have [] notice of the organization's religious identity.").

242. *About the AAUP*, AAUP, <https://www.aaup.org/about-aaup> (last visited Oct. 6, 2018). The AAUP has two sister organizations: (1) The AAUP Collective Bargaining Congress, which "promotes organizing among tenure-line and contingent faculty, academic professionals, and graduate employees and provide support to member chapters as they work to protect shared governance and academic freedom, to uphold professional standards and values," and (2) the AAUP Foundation, which "funds, through its grant making process, the charitable and educational purposes of the AAUP, including support for academic freedom and quality higher education." *Id.*

243. See generally Michael A. Helfand, *Implied-Consent Religious Institutionalism: Applications and Limits*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018).

244. WHEATON COLL., <https://www.wheaton.edu/> (last visited Oct. 6, 2018).

Turning to their student life page, the Wheaton experience is defined as “faith, living, and learning [that] are intimately intertwined,” directly underneath a photo of students participating in a religious music performance,²⁴⁵ possibly in the chapel where students meet three times a week for worship services.²⁴⁶ And even if this failed to alert a prospective student to Wheaton’s Christian environment, during the application process, the required pastoral recommendation surely will: it calls for a Christian spiritual leader to report on the student’s “personal commitment to Jesus Christ,” “spiritual maturity,” “spiritual influence,” “spiritual qualities,” “church leadership roles,” “dishonesty, abuse of alcohol or illegal drugs, or inappropriate internet usage,” and an overall “summary of the applicant’s spiritual life.”²⁴⁷

Of course, just because students understand the degree of faith infused into a degree program does not mean they will apprehend the accompanying limitations on academic freedom. For example, some students at Wheaton College stood with Larycia Hawkins, literally—standing up, wearing all black, in a crowd as Hawkins climbed the stairs to deliver her final address at Wheaton after she had agreed to part ways with the university.²⁴⁸ This show of solidarity prompted many others in the audience to rise as well.²⁴⁹ Thus, staking out the parameters of academic freedom for students remains prudent and can only decrease conflicts between the university and its students.

With a high level of transparency, professors and students alike can visualize a university’s religious bounds—what disciplines are most likely to remain free, unfettered, topics for investigation, and which will be governed by a set of predefined truths. In other words, voluntarily assuming a heightened obligation of notice to faculty and students ensures religious universities will not in fact “fly under false colors.”

Alternatively, a religious school, like Loma Linda University, could provide notice that it does not abide by the AAUP’s standards and rejects its authority altogether.²⁵⁰ However, doing so assumes the religious institution

245. *Life at Wheaton*, WHEATON COLL., <https://www.wheaton.edu/life-at-wheaton/> (last visited Oct. 20, 2018); see also *supra* notes 32–34.

246. *Spiritual Life*, WHEATON COLL., <https://www.wheaton.edu/life-at-wheaton/spiritual-life/> (last visited Oct. 20, 2018).

247. *Pastoral Recommendation*, WHEATON COLL., https://www.wheaton.edu/media/migrated-images-amp-files/media/files/admissionsaid/undergrad/app-forms/coll_pastor_rec.pdf (last visited Oct. 20, 2018); *How to Apply to the College of Arts and Sciences*, WHEATON COLL., <https://www.wheaton.edu/admissions-and-aid/undergraduate-admissions/apply-to-wheaton/undergraduate-admissions-process/how-to-apply-to-the-college-of-arts-and-sciences/> (last visited Oct. 20, 2018).

248. Ruth Graham, *The Professor Suspended for Saying Muslims and Christians Worship One God*, THE ATLANTIC (Dec. 17, 2015), <http://www.theatlantic.com/politics/archive/2015/12/christian-college-suspendprofessor/421029/>; Ruth Graham, *The Professor Wore a Hijab in Solidarity—Then Lost Her Job*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/16/magazine/the-professor-wore-a-hijab-in-solidarity-then-lost-her-job.html>.

249. *Id.*

250. See *supra* note 189.

accepts being categorized as an “illegitimate educational institution” in the eyes of the AAUP. It also assumes that the average professor applying for employment or the average student applying for admission would be familiar enough with the AAUP to realize the risk they take in becoming part of a university that is not, at least partly, committed to academic freedom around non-theological inquiry.

In the instance that a religious school opts to avail itself of the 1940 Statement’s limitation with appropriate notice to the world, the AAUP should apply its normal investigation and adjudication of violations of academic freedom to non-theological disputes at religious colleges and universities.

VIII. CONCLUSION

Religious colleges and universities straddle two spheres and perform two functions: they perpetuate and preserve distinctly religious commitments while educating students to assume lives in the world. They are not only institutions of higher learning, but institutions of faith and culture, too. And for many faiths, the very existence of the university is the result of a faith conviction—helping students to prepare for professions while passing on the unique elements of religious culture. These colleges and universities are the locus for priming of a community’s particular worldview, making their operation an existential concern for the faith tradition.²⁵¹

Unlike a limitations approach, which allows universities to place themselves all-in or all-out as to academic freedom, this approach fosters more respect for academic inquiry while leaving space for a vibrant pluralism that accommodates religiously infused higher education alongside secular education. Such diversity-promoting approaches are important to defuse the cultural tensions that have pulled on the fabric of the nation, which is so evident in higher education as a microcosm of American society.

Our goal is not to defend religiously affiliated universities as to all clashes over what is taught. While it may be true that “our society’s commitment to freedom of religion would demand some accommodation of the need of religious colleges and universities to modify the secular principles of academic freedom,”²⁵² we believe that it is the commitments most core to the covenantal university’s enterprise that certainly deserve protection—the nature of God, our relations as persons to Him, the authoritative nature of scripture, and so forth.

But as to scientifically falsifiable claims—whether the earth is flat—universities either need to give faculty the room to dissent or give notice to faculty *and* students that they are not real universities—in Finkin’s words,

251. Robin Fretwell Wilson, *Introduction*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 10 (Robin Fretwell Wilson ed., 2018).

252. See McConnell, *supra* note 50, at 315–16.

that they are “an unfree place . . . where no utterance contrary to some officially established truth [on *all* questions] may be heard on the institution’s property.”²⁵³

253. Finkin, *supra* note 188 (emphasis added).